# SUPREME COURT OF THE UNITED STATES.

## No. 219.

THE STATE OF MINNESOTA, PLAINTIFF IN ERROR,

vs.

GEORGE W. BATCHELDER.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

GOVERNMENT PRINTING OFFICE

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*Writ of Error.*

1 UNITED STATES OF AMERICA.

The President of the United States of America to the Judges of the Supreme Court of the State of Minnesota, greeting:

Because that in the record and process, and also in the rendering of judgment in an action before you, or some of you, between the State of Minnesota, plaintiff, and George W. Batchelder, defendant, a manifest error has intervened, to the great damage of the said plaintiff, as in its complaint has been stated; and as it is just and proper that the error, if any there be, should be corrected in due manner, and that full and speedy justice should be done to the parties aforesaid in this behalf, you are hereby commanded, that if judgment thereof be given, then under your seal you do distinctly and openly send the record and process in the suit aforesaid, with all things concerning them, and this writ, so that you have the same before the Chief Justice and the associate justices of the Supreme Court of the United States on the first Monday of December
2 next, at Washington, being the present seat of the national government, that the record and process aforesaid being inspected, they may cause to be done thereupon what of right ought to be done.

Witness the honorable Roger B. Taney, Chief Justice of the Supreme Court of the United States of America, this twenty-fifth day of November, in the year one thousand eight hun-
[L. S.] dred and sixty-two, and of our independence the eighty-seventh.

H. E. MANN,
*Clerk U. S. Circuit Court, Dist. Minnesota.*
By J. N. CARDOZO, *Deputy.*

3 Filed Nov. 25th, 1862.

A. McELRATH,
*Dep. Clerk Sup. Court of Minn'a.*

*Citation.*

4 UNITED STATES OF AMERICA, *ss:*

To George W. Batchelder, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the first Monday in December next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Minnesota, wherein the State of Minnesota is plaintiff and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the honorable Lafayette Emmett, chief justice of the said supreme court of Minnesota, this 20th day of November, in the year of our Lord 1862.

L. EMMETT,

*Chief Justice of the Supreme Court of Minnesota.*

5 STATE OF MINNESOTA,
*County of Rice, ss:*

G. E. Cole, being duly sworn, says that he is attorney for plaintiff; that on the 25th day of November, 1862, at Faribault, in said county, he served the within citation on the within-named defendant, George W. Batchelder, by delivering to and leaving with said defendant a true copy thereof, and at the same time exhibited the original to him.

G. E. COLE.

Sworn to before me this 25th day of November, 1862.

[SEAL.] F. W. FRINK,
*Notary Public.*

6 SUPREME COURT OF THE UNITED STATES, *ss:*

STATE OF MINNESOTA, plaintiff in error,
*vs.*
GEORGE W. BATCHELDER, defendant in error.

On a final judgment of the supreme court of the State of Minnesota, begun and holden at St. Paul, in said State, on the first day of July, A. D. 1862, wherein the said State of Minnesota is plaintiff, and the said George W. Batchelder, of the county of Rice, in said State, is defendant.

And the said State of Minnesota prays for a writ of error to issue, returnable to the next term of the Supreme Court of the United States, to be holden at Washington, the present seat of the national government, on the first Monday of December next, and assigns for errors in the record of the proceedings and judgment aforesaid the following, to wit:

1st. That the pleadings are insufficient in law to support the judgment, and that judgment was rendered for the defendant instead of the plaintiff.

7 2d. That the reply was sufficient in law, and the demurrer was improperly sustained.

3d. That the court improperly refused to allow proof that the lands in dispute were not settled upon until after the survey thereof by the United States government.

4th. That the court improperly affirmed the decision of the judge of the district court of the State, refusing to charge the jury that

section 18 of *of* the act of Congress of March 3d, 1849, constituted a reservation and appropriation of all sections therein described, and that by virtue of such appropriation to public uses the title passed out of the United States, and remaining in abeyance until the State was admitted, vested in her, and that such appropriation to public uses so divested the title from the United States as to render any subsequent grant of the same lands by the United States to parties other than the State void.

THE STATE OF MINNESOTA,
By its attorney general, G. E. COLE.

8 *Writ of Error.*

UNITED STATES OF AMERICA,
*Supreme Court, State of Minnesota, ss:*

THE STATE OF MINNESOTA.

To the Hon. N. M. Donaldson, judge of the district court of the fifth judicial district of the said State of Minnesota:

Whereas it has been represented to us that in a certain action lately pending in your court, before you, sitting in and for the county of Rice, in said district, wherein the State of Minnesota is plaintiff, and George W. Batchelder, defendant, error has intervened, to the damage, as is said, of the said plaintiff; and we being willing that such error, if any there should be, may be correct, and full and speedy justice done in that behalf,

Do command you, that if final judgment be thereupon given, then, without delay, you cause to be sent to us, distinctly and openly, under the seal of your court, and annexed to this writ, a certified transcript of the judgment roll, bill of exceptions, and other proceedings on file and of record in said cause in your court; that having the same in our said supreme court, on or before the first day of the next term thereof, to be held at the capitol, in the city of St. Paul, in said State, we may cause further to be done therein, what of right, and according to the laws of the land, ought to be done.

Witness the Hon. Lafayette Emmett, chief justice of said supreme court, and the seal thereof affixed at St. Paul aforesaid, this twentieth 20*th* day of May, A. D. 1862.

A. J. VAN VORHES,
*Clerk of the Supreme Court.*
By E. H. BURRITT, *Deputy.*

9 OFFICE OF CLERK DIST. COURT,
*Rice County, Minnesota.*

Rec'd and filed, May 21st, 1862.

MILES HOLLISTER, *Clerk.*
G. E. COLE,
*Att'y for Pl'ff in Error.*

10 District court, fifth judicial district.

STATE OF MINNESOTA,
*Rice County.*

STATE OF MINNESOTA
*against*
GEORGE W. BATCHELDER. } Summons for relief.

To GEORGE W. BATCHELDER, the above-named defendant:

You are hereby summoned and required to answer the complaint in this action, a copy of which is herewith served upon you, and to serve a copy of your answer to the said complaint on the subscriber, at his office, at St. Paul, in the county of Ramsey and State of Minnesota, within twenty days after the service hereof, exclusive of the day of such service; and if you fail to answer the said complaint within the time aforesaid, the plaintiff in this action will apply to the court for the relief demanded in the complaint.

G. E. COLE,
*Attorney General, Plaintiff's Attorney.*

Dated Faribault, October 25th, 1860.

11 District court, fifth judicial district.

STATE OF MINNESOTA,
*County of Rice.*

STATE OF MINNESOTA, plaintiff,
*against*
GEORGE W. BATCHELDER, defendant. }

The State of Minnesota, plaintiff in the above entitled action, complains of the defendant, and states the following facts constituting pl'ff's cause of action: that the plaintiff was on the twenty-fifth day of June, A. D. 1860, and ever since that time has been and continued in the constant, actual, and lawful possession of the following described real estate, situated in the county of Rice and State of Minnesota, to wit: the west half of the southwest quarter, and the southwest quarter of the northwest quarter, and the southeast quarter of the southwest quarter of section number thirty-six, in township number one hundred and ten, north of range number twenth-one west, and is now in the actual possession thereof, and that the plaintiff is lawfully entitled thereto.

And the plaintiff further states that the defendant claims some estate on interest in said premises adverse to the plaintiff.

12 Wherefore the plaintiff prays this court to adjudge such adverse claims of the defendant to be void.

G. E. COLE,
*Att'y Gen'l, Plaintiff's Attorney.*

Dated Faribault, Oct. 25th, 1860.

I hereby certify that I have, this 29th day of Oct., A. D. 1860, at Faribault, in Rice county, made personal service of the within summons and complaint on Geo. W. Batchelder, the defendant therein named, by giving to and leaving with him an attested copy thereof.

JOSIAH S. FULLER,
*Sheriff of Rice Co.*

| | |
|---|---|
| Fees: Service | $1 00 |
| Copy | 50 |
| Travel | 20 |
| | 1 70 |

OFFICE OF CLERK OF DIST. COURT,
*Rice County, Minnesota.*

Filed May 30th, 1861.

MILES HOLLISTER, *Clerk.*
G. E. COLE,
*Att'y General, Pl'ff's Att'y.*

13 *Answer.*

District court, Rice county.

STATE OF MINNESOTA,
*Fifth Judicial District.*

STATE OF MINNESOTA
*against*
GEORGE W. BATCHELDER.

The defendant, for answer to the complaint of the plaintiff in the above entitled action, admits that the defendant claims estate and interest in the premises described in the complaint adverse to the plaintiff, and, save as aforesaid, the defendant denies each and every allegation, fact, matter, and thing in said complaint contained.

Wherefore the defendant demands judgment against the pl'ff for the costs and disbursements of this action.

BATCHELDER & BUCKHAM,
*Attorneys for Defendant.*

14 District court, Rice county.

STATE OF MINNESOTA
*ag'st*
GEO. W. BATCHELDER.

*Answer.*

Personal service of the within by copy admitted this 1st day of Nov., 1860.

G. E. COLE, *Att'y for Plaintiff.*
BATCHELDER & BUCKHAM,
*Att'ys for Defendant.*

District court, Rice county.

STATE OF MINNESOTA,
*Fifth Jndicial District.*

STATE OF MINNESOTA
*against*
GEO. W. BATCHELDER. } Answer (amended.)

The defendant, for an answer to the complaint of the plaintiff in the above entitled action, admits that the defendant claims estate and interest in the premises described in the complaint adverse to the plaintiff, and, save as aforesaid, the defendant denies each and every allegation, fact, matter, and thing in said complaint contained.

And the defendant further answering, says that on the 15th day of August, A. D. 1857, the legal title to the land described in the complaint was in the United States. That on the day aforesaid, one Lewis Mills, claiming a vested right of pre-emption of the west half of the southwest quarter and the southwest quarter of the northwest quarter of section thirty-six, in town one hundred and ten, north of range twenty-one west, in the district of lands then subject to sale at Faribault, Rice county, aforesaid, applied to the register and receiver of the proper United States land office at Faribault aforesaid to pre-empt the same, and under the official order and judgment, and then and there duly made and rendered by them, the said register and receiver, the said Lewis Mills, then and there pre-empted and purchased the land hereinbefore described, of the United States, through the said register and receiver, being one hundred and twenty acres, paid the full amount of the purchase money, and received from the said register and receiver the usual duplicate certificate of pre-emption entry therefor, a copy of which duplicate, marked A, is hereto attached and made part of the answer; and for further answer, the defendant avers that subsequently, on the 10th day of November, A. D. 1859, a patent for the said land, duly executed, was issued by the United States in favor of said Lewis Mills, and delivered to him; that afterwards, on the 28th day of February, A. D. 1860, the said Lewis Mills being still the owner of and in possession of said land by virtue of his said purchase, the defendant and one Thomas S. Buckham purchased the same of the said Mills, and he, the said Mills, at the same time made, duly executed, acknowledged and delivered to the defendant and said Thomas S. Buckham, jointly, a deed of the same; and the defendant, further answering, says that on the 15th day of August, A. D. 1857, one John N. Mills, claiming a vested right of pre-emption of the east half of the southwest quarter and southeast quarter of the northwest quarter of the same section, town, range and land district, applied to the register and receiver of the said land office to pre-empt the same, and, under the official order and judgment then and there duly made and rendered by them, the said register and receiver, the said John

N. Mills, then and there pre-empted and purchased of the U. S., through the said register and receiver, the land last above described, being one hundred and twenty acres, paid the purchase money, and received from the said register and receiver the usual duplicate certificate of pre-emption entry therefor, a copy of which, duplicate, marked B, is hereto attached and made a part of this answer.

17 And for further answer, the defendant says that subsequently, on or about the 10th day of Nov., A. D. 1860, a patent for the land last described, duly executed, was issued by the United States in favor of the said John N. Mills, that the said John N. Mills being still the owner and in possession of said land described before the commencement of this action.

That afterwards, on the 21st day of July, 1860, the defendant purchased from the estate of the said John N. Mills, deceased, at an administrator's sale, through Frederick Howland, the administrator thereof, duly appointed and authorized by the probate court in and for Rice county aforesaid to make such sale, the southeast quarter of the southwest quarter of said section thirty-six, town and range aforesaid, and on the 23d day of the same month the said sale of the administrator was duly confirmed by the said probate court, and the defendant received a deed of the land last described.

That by virtue of the said purchase made by the defendant, and the said deeds made to him, he, the defendant, became and still continues to be the owner of the land described in the complaint.

Wherefore the defendant demands judgment, that this action be dismissed with costs.

BATCHELDER & BUCKHAM,
*Att'ys for Defendant.*

18 (A.)

Military bounty land act of March 3d, 1855.

Register's office, Faribault, Minn. Ter., Aug. 15th, 1857.—Military land warrant No. 22,367, in the name of George Fansell, has this day been located by Lewis Mills upon the W. ½ of SW. ¼ and SW. ¼ of NW. ¼ of section 36, in township 110, north of range 21 west; contents of tract 120 acres.

SAMUEL PLUMBER, *Register.*

(B.)

Military bounty land act of March 3d, 1855.

Register's office, Faribault, Minn'a Ter., Aug. 15th, 1857.—Military land warrant 38,450, in the name of Elisha Parlton, has this day been located by John N. Mills upon the E. ½ of SW. ¼ and SE. ¼ of NW. ¼ of section 36, in township 110, north of range 21 west; contents of tract 120 acres.

SAMUEL PLUMBER, *Register.*

Endorsed: Copy of duplicates of Lewis and John N. Mills.

Endorsed: County district court. State of Minnesota against George W. Batchelder. Amended answer. Personal service of the within admitted. G. E. Cole, att'y gen'l, pl'ff's att'y.

Endorsed: Office of clerk district court, Rice county, Minnesota. Filed May 30th, 1861. Miles Hollister, clerk. Batchelder & Buckham, attorneys for defendant.

District court, fifth judicial district.

STATE OF MINNESOTA,
*County of Rice.*

STATE OF MINNESOTA
*against*
GEORGE W. BATCHELDER. } Reply amended.

1st. For reply to the amended answer to the complaint in the above-entitled action, the plaintiff denies that on the 15th day of August, A. D. 1857, the legal title to the land described in the complaint was in the United States, but alleges that, on the twenty-sixth day of February, A. D. 1857, the United States, then being lawfully possessed as owner in fee simple of said land by an act of Congress approved on that day, duly granted and conveyed said land to the plaintiff, and the legal title thereof then vested, and has ever since continued. in the pl'ff.

2d. And for a further reply, plaintiff admits that on the 15th day of August aforesaid one Lewis Mills applied to the register and receiver of the U. S. land office within and for the district in which said premises are situated, to pre-empt the west half of the southwest quarter and the southwest quarter of the northwest quarter of section No. thirty-six, in township No. one hundred and ten, north of range 21 west, and received a duplicate or certificate of the pre-emption thereof, and that a patent was issued therefor to said Mills.

3d. And a further reply, plaintiff alleges that said purchase and pre-emption was made by fraud and misrepresentations, and that the issuing of said duplicate and patent was procured by fraud and misrepresentation; that said Lewis Mills did not settle on said premises, did not erect a dwelling-house thereon, and did not make, or cause to be made, any improvements thereon prior to the survey thereof by the government of the United States, and did not, in any respect, comply with or bring himself within the provisions of a joint resolution of the Congress of the United States entitled "A resolution relative to section sixteen and thirty-six in the Territories of Minnesota, Kansas, and Nebraska," approved March 3d, 1857, or of an act approved September 4th, 1841, but that said Mills, well knowing the premises and with intent to defraud the plaintiff, falsely and fraudulently represented to the officers of such land office that he had settled on said premises and had erected a dwelling-house, and had made divers improvements thereon prior to said survey, and by fraud and misrepresentation induced one George Dazner to make a false oath and affidavit to said settlement, the erection of said dwell-

ing-house and improvements; and the plaintiff avers that, without such oath and affidavit, and without such representations so fraudulently made and procured, said officers would not have allowed said Mills to pre-empt said premises, and said duplicate and patent would not have been issued to said Mills by the government of the United States as aforesaid.

4th. And for a further reply, plaintiff admits that one John N. Mills, on the fifteenth day of August, A. D. 1857, applied to the officers of the land office in and for the district, where the premises described in the complaint are situated, to pre-empt the east half of the southwest quarter and the southeast quarter of the southwest quarter of the section hereinbefore mentioned, and purchased and pre-empted the same, and that a duplicate or certificate of
22 pre-emption of said premises was issued to said Mills, and that thereafterwards a patent was issued therefor by the United States government to said Mills.

5th. That said pre-emption was effected, and said duplicate and patent procured by the fraudulent representations of said Mills; that said Mills, well knowing the premises, falsely and fraudulently represented to said officers that he had settled upon said land; had erected a dwelling-house thereon, and made improvements thereon prior to the survey thereof by the United States government, and procured one George Dazner to make a false oath and affidavit of said settlement, the erection of such dwelling-house and improvements, before said officers, and that said officers were thereby induced to allow said pre-emption and to issue said duplicate; whereas, in truth and in fact, said Mills did not settle on said land, did not erect a dwelling-house thereon, and did not make any improvements thereon prior to said survey, and did not, in any respect, bring himself within the provisions of a joint resolution of the Congress of the United States, entitled "A resolution relative to sections sixteen and thirty-six, in the Territories of Minnesota, Kansas, and Nebraska, approved March 3d, 1857," or of "An act of Congress approved September 4th, 1841."

6th. And plaintiff further says, that defendant purchased all of the premises hereinbefore mentioned, with full notice of the plain-
23 tiff's title and of the fraudulent procurement of said pre-emption.

7th. And for a further reply, plaintiff alleges that the register and receiver of the United States land office at Faribault had no authority or jurisdiction to make the order and judgment set forth in said amended answer, and had no authority or jurisdiction to grant said land to or allow the same to be pre-empted by said Lewis Mills or said John N. Mills, for that no settlement by the erection of a dwelling-house on said land, or the cultivation of any portion thereof by the said Lewis Mills or the said John N. Mills, was made on said land before the said lands were surveyed by the United States government; and for that no settlement thereon, by the erection of a dwelling-house or the cultivation of any portion thereof, was made by any person whatever before the said land was surveyed by the United States government.

8th. And as to each and every allegation of new matters in said answer contained not herein expressly admitted, the plaintiff denies the same.

Dated April 3d, 1861.

G. E. COLE,
*Att'y General, Plaintiff's Att'y.*

May term, 1861.

This amendment was allowed, and copy served on defendant, during the term, to wit, May 18th, 1861.

24 Endorsed: State of Minnesota, Rice county. District court, fifth judicial district. State of Minnesota *ag'st* George W. Batchelder. Reply. Due service of the within admitted April 3d, 1861. Batchelder & Buckham, defendant's att'ys. Office of clerk of district court, Rice county, Minnesota. Filed May 30th, 1861. Miles Hollister, clerk. G. E. Cole, pl'ff's att'y.

District court, fifth judicial district. At the May term thereof, 1861.

STATE OF MINNESOTA,
*Rice County.*

STATE OF MINNESOTA *against* GEORGE W. BATCHELDER. } Demurrer to reply.

The defendant demurs to so much of the reply of the plaintiff as is embraced and contained in the third, fifth, sixth, and seventh grounds of reply for the insufficiency thereof; for that it appears upon the face thereof that it does not state facts sufficient to constitute a ground of reply.

BATCHELDER & BUCKHAM,
*Atty's for Defendants.*

25 Endorsed: Rice county, dist. court. State of Minnesota against George W. Batchelder. Demurrer to reply served on us by copy, May 5, 1861. G. E. Cole, att'y for pl'ff. Office of clerk dist. court, Rice Co., Minnesota. Filed May 30th, 1861. Miles Hollister, clerk. Batchelder & Buckham, att'ys for defendant.

State of Minnesota, fifth judicial district.

DISTRICT COURT,
*Rice County.*

STATE OF MINNESOTA *against* GEORGE W. BATCHELDER. } Orders sustaining demurrer.

The issue of law upon the demurrer of the defendant to the reply of the plaintiff in the above entitled action being brought on for trial before me, at a regular term of said court, began and holden at Faribault, in said county, on the first Monday of May, A. D. 1861,

after hearing George W. Batchelder, of counsel for the defendant, in favor of said demurrer, and Gordon E. Cole, of counsel for the plaintiff, in opposition to the same, it is ordered that the said
26 demurrer be, and the same is hereby, sustained for the reasons set forth in said demurrer, to wit:

For that so much of said reply as is embraced and contained in the third, fifth, sixth, and seventh grounds of reply, being all that portion of said reply which was demurred to by the defendant, is insufficient, and appears upon the face thereof that the same does not state facts sufficient to constitute a ground of reply.

N. M. DONALDSON,
*Judge District Court, 5th District.*

Endorsed: Rice county, dist. court. State of Minnesota against George W. Batchelder. Office of clerk of dist. court, Rice county, Minnesota. Filed May 30th, 1861. Miles Hollister, clerk. Order sustaining demurrer. Due. Personal service of the within is admitted by copy at Faribault, May 29th, 1861. G. E. Cole, pl'ff's att'y. Batchelder and Buckham, att'ys for defendant.

27 STATE OF MINNESOTA,
*District Court, Fifth Judicial District, Rice County.*

STATE OF MINNESOTA
*ag'st*
GEORGE W. BATCHELDER.

To Batchelder and Beckham, def'ts att'ys, and Miles Hollister, clerk of district court, Rice county:

SIR: Take notice that the plaintiff appeals to the Supreme Court from the order made and entered in this action with the clerk of said district court, at the general term of the said district court, holden in and for said county of Rice on the sixth day of May, A. D. 1861, sustaining the demurrer to so much of the reply of the plaintiff as is embraced and contained in the third, fifth, sixth, and seventh grounds of reply.

Dated Faribault, May 30th, 1861.

G. E. COLE, *Pl'ff's Att'y.*

Endorsed: State of Minnesota, district court, 5th judicial district, Rice county. State of Minnesota against George W. Batchelder. Notice of appeal. Copy. Office of clerk dist. court, Rice county, Minnesota. Filed May 30th, 1861. Miles Hollister, clerk. G. E. Cole, pl'ff's att'y.

28 District court, Rice county.

STATE OF MINNESOTA
*Fifth Judicial District.*

STATE OF MINNESOTA
*ag'st*
GEORGE W. BATCHELDER.

Whereas the State of Minnesota has appealed to the Supreme Court from the orders sustaining the demurrer to so much of the reply of the plaintiff as is embraced and contained in the third, fifth, sixth, and seventh grounds of reply, made and entered with the clerk of said district court, at the general term thereof, holden in and for the said county of Rice, on the sixth day of May, A. D. 1861:

Now, therefore, we, G. E. Cole and J. H. Case, both of Faribault, in the county of Rice and State of Minnesota, do undertake that the said appellant shall pay all damages, costs and charges which may be awarded against the said State of Minnesota on the said appeal not exceeding the sum of two hundred and fifty dollars.

Dated Faribault, May 30th, 1861.

G. E. COLE. [SEAL.]
J. H. CASE. [SEAL.]

29 District court, Rice county.

STATE OF MINNESOTA,
*Fifth Judicial District.*

STATE OF MINNESOTA
*against*
GEORGE W. BATCHELDER.

COUNTY OF RICE, *ss:*

G. E. Cole and J. H. Case, of Faribault, in said county of Rice, being each duly , doth, each for himself, depose and say that he is worth the sum of five hundred dollars over and above all debts and responsibilities which he owes or has incurred.

G. E. COLE.
J. H. CASE.

Subscribed and sworn to this 30th day of May, A. D. 1861, before me.

[L. S.] J. L. FRISBIE,
*Notary Public.*

COUNTY OF RICE, *ss:*

On this 30th day of May, A. D. 1861, before me personally appeared G. E. Cole and J. H. Case, to me known to be the individuals described in and who executed the foregoing undertaking, and severally acknowledged that they executed the same.

[L. S.] J. L. FRISBIE,
*Notary Public.*

30 STATE OF MINNESOTA,
*County of Rice, ss:*

I hereby approve the foregoing undertaking and the sureties therein named this 30th day of May, A. D. 1861.

MILES HOLLISTER,
*Clerk Dist Court, Rice Co. Minn'a.*

Endorsed: State of Minnesota, district court, 5th judicial district, Rice county. State of Minnesota ag'st George W. Batchelder. Undertaking for appeal. Office of clerk dist. court, Rice Co., Minnesota. Filed May 30th, 1861. Miles Hollister, clerk. G. E. Cole, pl'ff's att'y.

*Mandate.*

UNITED STATES OF AMERICA,
*Supreme Court, State of Minnesota, ss:*

The State of Minnesota to the hon. judge and officers of the district court of the fifth judicial district, sitting within and for the county of Rice, greeting:

Whereas lately in your court, in an action therein pending,
31 wherein the State of Minnesota was plaintiff and George W. Batchelder defendant, a certain judgment was had therein, from which said judgment the said plaintiff appealed to our supreme court:

And whereas the same was duly argued, heard, and submitted at the July term, 1861, of our supreme court. After mature deliberation thereupon had, our supreme court did adjudge, determine, decree, and order, that the judgment of the court below be, and the same is hereby, in all things affirmed:

Now, therefore, this mandate is to you directed, and certified to inform you of these proceedings, had in our supreme court in said hereinbefore mentioned cause; and the same is hereby and herewith remanded to your court for such other and further record and proceedings therein as may be by law necessary, just, and proper, under and by virtue of the said order herein made.

Witness the Hon. Lafayette Emmet, chief justice of the supreme
[L. S.] court, and the seal thereof affixed, at Saint Paul, this 26th day of December, A. D. 1861.

A. J. VAN VORHES,
*Clerk of the Supreme Court,*
By E. H. BURRETT, *Deputy.*

32 Endorsed: Mandate. To the district court of Rice county, supreme court, State of Minnesota. The State of Minnesota against George W. Batchelder. Office of clerk dist. court, Rice county, Minnesota. Filed December 31st, 1861. Miles Hollister, clerk.

We, the jury in the case of the State of Minnesota against George W. Batchelder, find a verdict for the def't.

CHAS. WOOD, *Foreman.*

Endorsed: State *vs.* Batchelder. Verdict. Office of clerk district court, Rice county, Minnesota. Filed May 5th, 1862. Miles Hollister, clerk.

District court, Rice county.

STATE OF MINNESOTA,
*Fifth Judicial District.*

STATE OF MINNESOTA
*against*
GEORGE W. BATCHELDER. } Judgment entry.

This action being at issue, and having been tried before the
33 Hon. N. M. Donaldson, judge of said court, and a jury, on the 5th day of May, A. D. 1862, and the verdict of the jury having been entered, whereby they find for the defendant:

Now, on motion of Batchelder & Buckham, att'ys for the defendant, it is adjudged that the said defendant recover of the said plaintiff the sum of two and $\frac{05}{100}$ dollars for his costs and disbursements which he has wrongfully sustained in this action.

Witness my hand and seal of the district court at Faribault, in said county, this 15th day of May, A. D. 1862.

MILES HOLLISTER,
[L. S.] *Clerk Dis. Court, Rice County, Minne.*

STATE OF MINNESOTA, *ss:*
*County of Rice.*

We hereby waive notice of taxation of costs and entry of judgment, and consent that the costs be taxed at two dollars and five cents, the plaintiff reserving all right to object to said judgment upon appeal.

G. E. COLE, *Pl'ffs Att'y.*

34 Endorsed: State of Minnesota, Rice county, district court, 5th judicial district. State of Minnesota against George W. Batchelder. Judgment roll. Office of clerk dist court, Rice county, Minn'a. Filed May 15th, 1862. Miles Hollister, clerk.

*Bills of exceptions.*

Dist. court, Rice county.

STATE OF MINNESOTA,
*Fifth Judicial District.*

STATE OF MINNESOTA
*against*
GEORGE W. BATCHELDER.

The following are the pleadings in this action:

District court, fifth judicial district.

STATE OF MINNESOTA,
*County of Rice.*

STATE OF MINNESOTA, plaintiff,
*against*
GEORGE W. BATCHELDER, defendant. } Complaint.

*Pleadings.*

The State of Minnesota, plaintiff in the above entitled action,
35 complains of the defendant, and states the following facts constituting plaintiff's cause of action: That this plaintiff was, on the twenty-fifth day of June, A. D. 1860, and ever since that time has been, and continued in the constant actual and lawful possession of the following described real estate, situated in the county of Rice and State of Minnesota, to wit: the west half of the southwest quarter, and the S. west quarter of the northwest quarter, and the southeast quarter of the southwest quarter of section numbered 36, in township No. one hundred and ten north, of range No. twenty-one west, and is now in the actual possession thereof, and that the plaintiff is lawful entitled thereto. And the plaintiff further states that the defendant claims some estate or interest in said premises adverse to the plaintiff, wherefore the plaintiff prays this court to adjudge such adverse claim of the defendant to be void.

G. E. COLE,
*Att'y General, Pl'ff's Att'y.*

Dated Faribault, Oct. 25th, 1860.

*Answers (amended.)*

District court, fifth judicial district.

STATE OF MINNESOTA,
*County of Rice.*

STATE OF MINNESOTA
*against*
GEORGE W. BATCHELDER.

The defendant, for answer to the complaint of the pl'ff in the above entitled action, admits that the defendant claims estate and in-
36 terest in the premises described in the complaint adverse to the pl'ff, and save as aforesaid, the defendant denies each and every allegation, fact, matter and thing in said complaint contained.

And the defendant, further answering, says: That on the 15th day of Aug., A. D. 1857, the legal title to the land described in the complaint was in the United States; that on the day aforesaid one Lewis Mills, claiming a vested right of pre-emption of the west half

of the southwest quarter and the southwest quarter of the northwest quarter of said section thirty-six, of town. one hundred and ten north, of range twenty-one west, in the district of lands then subject to sale at Faribault, Rice county, aforesaid, applied to the register and receiver of the proper United States land office, at Faribault aforesaid, to pre-empt the same; and under the official order and judgment then and there duly made and rendered by them, the said register and receiver, the said Lewis Mills, then and there pre-empted and purchased the land hereinbefore described of the United States, through the said register and receiver, being one hundred and twenty acres; paid the full amount of the purchase-money, and received from the said register and receiver the usual duplicate certificate of pre-emption entry therefor, a copy of which duplicate, marked (A,) is hereunto attached and made a part of this answer.

37 And for a further answer defendant avers: That subsequently, on the 10th day of Nov., A. D. 1859, a patent for the said land, duly executed, was issued by the United States in favor of said Lewis Mills, and delivered to him. That afterwards, on the 28th day of February, A. D. 1860, the said Lewis Mills being still the owner of and in possession of said land by virtue of his said purchase, the defendant and one Thomas S. Buckham purchased the same of the said Mills, and he, the said Mills, at the same time made, duly executed, acknowledged, and delivered to the defendant and said Thomas S. Buckham a deed of the same. And the defendant, further answering, says: That on the 15th day of Aug., A. D. 1857, one John N. Mills, claiming a vested right of pre-emption of the east half of the southwest quarter and southeast quarter of southwest quarter of the same section, town., and range, and land district, applied to the register and receiver of the said land office; and under the official order and judgment then and there duly made and rendered by them, the said register and receiver, the said John N. Mills, then and there pre-empted and purchased of the United States, through the said register and receiver, the land last above described, being one hundred and twenty acres; paid the purchase-money, and received from the said register and receiver the usual duplicate certificate of pre-emption entry therefor, a copy of which duplicate, marked (B,) is hereto attached and made part of this answer.

38 And for a further answer the defendant says: That subsequently, on or about the 10th day of November, A. D. 1859–1860, a patent for the land last described, duly executed, was issued by the United States in favor of the said John N. Mills; that the said John N. Mills being still the owner and in possession of said land, deceased, before the commencement of this action.

That afterwards, on the 21st day of July, 1860, the defendant purchased from the estate of the said John N. Mills, deceased, at an administrator's sale, through Frederick Howland, the administrator thereof, duly appointed and authorized by the probate court in and for Rice county aforesaid, to make such sale, the southeast quarter of the southwest quarter of said section thirty-six, town., and range aforesaid, and on the 23d day of the same month the said sale of

the administrator was duly confirmed by the said probate court, and the defendant received a deed of the land last described. That by virtue of the said purchase made by this defendant, and the said deeds made to him, he, the defendant, became, and still continues to be, the owner of the land described in the complaint.

Wherefore, the defendant demands judgment that this action be dismissed with costs.

BATCHELDER & BUCKHAM,
*Att'ys for Defendant.*

(A.)

Military bounty land act of March 3d, 1855.

Register's office, Faribault, Minn. Ter., Aug. 15th, 1857.—
39 Military land warrant No. 22367, in the name of George Fansell, has this day been located by Lewis Mills upon the W. ½ of SW. ¼ and SW. ¼ of NW. ¼ of section 36, in township 110 north, of range 21 west; contents of tract, 120 acres.

SAMUEL PLUMMER,
*Register.*

(B.)

Military bounty land act of March 3d, 1855.

Register's office, Faribault, Minn. Ter., Aug. 15th, 1857.—Military land warrant No. 38450, in the name of Elisha Parlton, has this day been located by John N. Mills upon the E. ½ of SW. ¼ and SE. ¼ of NW. ¼ of section 36, in township 110 north, of range 21 west; contents of tract, 120 acres.

SAMUEL PLUMMER,
*Register.*

District court, fifth judicial district.

STATE OF MINNESOTA,
*County of Rice.*

STATE OF MINNESOTA
*against*
GEORGE W. BATCHELDER. } Reply amended.

40 1st. For reply to the amended answer to the complaint in the abov-eentitled action, the plaintiff denies that on the 15th day of August, A. D. 1857, the legal title to the land described in the complaint was in the United States, but alleges that on the twenty-sixth day of February, A. D. 1857, the United States, then being lawfully possessed as owner in fee simple of said land by an act of Congress approved on that day, duly granted and conveyed said land to the plaintiff, and that the legal title thereof then vested, and has ever since continued, in the plaintiff.

2d. And for a further reply, plaintiff admits that on the 15th day of August aforesaid one Lewis Mills applied to the register and receiver of the United States land office, within and for the district in which said premises are situate, to pre-empt the west half of the southwest quarter and the southwest quarter of the northwest quarter of section No. thirty-six, in township No. one hundred and ten north, of range twenty-one west, and received a duplicate or certificate of the pre-emption thereof, and that a patent was issued therefor to said Mills.

3d. And for a further reply, plaintiff alleges that said purchase and pre-emption was made by fraud and misrepresentation, and that the issuing of said duplicate and patent was procured by fraud and misrepresentation; that said Lewis Mills did not settle on said premises, did not erect a dwelling-house thereon, and did not make or cause to be made any improvements thereon prior to the survey
41 thereof by the government of the United States, and did not in any respect comply with or bring himself within the provisions of a joint resolution of the Congress of the United States, entitled "A resolution relative to sections sixteen and thirty-six, in the Territories of Minnesota, Kansas and Nebraska," approved March 3d, 1847, or of an act approved September 4th, 1841; but that said Mills, well knowing the premises, and with intent to defraud the plaintiff, falsely and fraudulently represented to the officers of such land office that he had settled on said premises, and had erected a dwelling-house, and had made divers improvements thereon prior to said survey, and by fraud and misrepresentation induced one George Dazner to make a false oath and affidavit to said settlement, the erection of said dwelling-house and improvements; and the plaintiff avers that without such oath and affidavit, and without such representation, so fraudulently made and procured, said officers would not have allowed said Mills to pre-empt said premises, and said duplicate and patent would not have been issued to said Mills by the government of the United States as aforesaid.

4th. And for a further reply, plaintiff admits that one John N. Mills, on the 15th day of August, A. D. 1857, applied to the officers of the land office in and for the district where the premises described in the complaint are situate to pre-empt the east half of the southwest quarter and the southwest quarter of the southwest quarter of the section hereinbefore mentioned, and purchased and pre-
42 empted the same; and that a duplicate or certificate of pre-emption of said premises was issued to said Mills, and that thereafterwards a patent was issued therefor by the United States government to said Mills.

5th. That said pre-emption was effected and said duplicate and patent procured by the fraudulent representations of said Mills; that said Mills, well knowing the premises, falsely and fraudulently represented to said officers that he had settled upon said land, had erected a dwelling-house thereon, and made improvements thereon prior to the survey thereof by the United States government, and procured one George Dazner to make a false oath and affidavit of said settle-

ment, the erection of such dwelling-house and improvements, before such officers, and that said officers were thereby induced to allow said pre-emption and to issue said duplicate; whereas, in truth and in fact, said Mills did not settle on said land, did not erect a dwelling-house thereon, and did not make any improvements thereon prior to said survey, and did not in any respect bring himself within the provisions of a joint resolution of the Congress of the United States, entitled "A resolution relative to sections sixteen and thirty-six, in the Territories of Minnesota, Kansas and Nebraska," approved March 3d, 1857, or of an act of Congress approved September 4th, 1841.

6th. And plaintiff further says that defendant purchased all of the premises hereinbefore mentioned, with full notice of the plaintiff's title and of the fraudulent procurement of said pre-emption.

43 7th. And for a further reply, plaintiff alleges that the register and receiver of the United States land office at Faribault had no authority or jurisdiction to make the order and judgment set forth in said amended answer, and had no authority or jurisdiction to grant said land to, or allow the same to be pre-empted by said Lewis Mills or said John N. Mills, for that no settlement by the erection of a dwelling-house on said land, or the cultivation of any portion thereof, by the said Lewis Mills or the said John N. Mills, was made on said land before the said land was surveyed by the United States government, and for that no settlement thereon by the erection of a dwelling-house, or the cultivation of any portion thereof, was made by any person whatever before the said land was surveyed by the United States government.

8th. And as to each and every allegation of new matter in said answer contained, not herein expressly admitted, the plaintiff denies the same.

G. E. COLE,
*Attorney General, Plaintiff's Attorney.*

Dated April 3, 1861.

District court, fifth judicial district.

STATE OF MINNESOTA,
*County of Rice, ss:*

At the May term thereof, 1861.

STATE OF MINNESOTA,
*against*
GEORGE W. BATCHELDER. } Demurrer to reply.

44 The defendant demurs to so much of the reply of the plaintiff as is embraced and contained in the third, fifth, sixth, and seventh grounds of reply for the insufficiency thereof, for that it appears upon the face thereof that it does not state facts sufficient to constitute a ground of reply.

BATCHELDER & BUCKHAM,
*Attorneys for Defendant.*

*Order sustaining demurrer.*

District court, fifth judicial district.

STATE OF MINNESOTA,
*County of Rice.*

STATE OF MINNESOTA
*against*
GEORGE W. BATCHELDER.

The issue of law upon the demurrer of the defendant to the reply of the plaintiff in the above-entitled action being brought on for trial before me, at a regular term of said court, begun and holden at Faribault, in said county, on the first Monday of May, A. D. 1861, after hearing George W. Batchelder, of counsel for the defendant, in favor of said demurrer, and Gordon E. Cole, of counsel for the plaintiff, in opposition to the same, it is ordered that the said demurrer be, and the same is hereby, sustained, for the reasons set forth in said demurrer, to wit: For that so much of said reply as is embraced and
45 contained in the third, fifth, sixth, and seventh grounds of reply, being all that portion of said reply which was demurred to by the defendant, is insufficient, and it appears upon the face thereof that the same does not state facts sufficient to constitute a ground of reply.

N. M. DONALDSON,
*Judge District Court, 5th District.*

The foregoing are copies of all the pleadings and the order in the case. The case was argued and submitted upon the reply and demurrer at the May term of the district court for Rice county, and an order made therein sustaining the demurrer, from which the plaintiff appealed to this court.

G. E. COLE,
*Plaintiff's Attorney.*

From the order of the district court sustaining the demurrer as aforesaid, the plaintiff appealed to the supreme court of the State, and at the July term of said court, 1861, upon hearing said demurrer argued, it was adjudged that the order of the district court, striking out the third, fifth, sixth, and seventh grounds of reply, be affirmed, and the case was remanded to the district court for further proceedings.

At the May term of said district court, held on the fifth day
46 of May, A. D. 1862, said cause coming on to be heard, a jury was impanelled therein, and, for the purposes of this action, the defendant admitted that the plaintiff was, at the time of the commencement of this action, and still is, in the actual possession of the premises in dispute. And, for the purposes of this action, the plaintiff admitted the purchase by the defendant from the pre-emption of the land in dispute, the regularity of the appointment of and proceedings by the administrator, and the purchase by defendant from the administrator, and that deeds were duly executed by said pre-

emptor and administrator to the defendant, as alleged in the answer; all which admissions were made in open court and entered upon the minutes.

The plaintiff, for the purpose of proving that by an act of Congress entitled "An act to authorize the people of Minnesota to form a constitution and State government preparatory to their admission into the Union on an equal footing with the original States," approved February 26th, 1857, as modified by a joint resolution of Congress, entitled "A resolution relative to sections sixteen and thirty-six, in the Territories of Minnesota, Kansas, and Nebraska," approved March 3d, 1857, the land in dispute was conveyed and passed by said laws to the plaintiff, offers to prove that the said lands were not settled upon by the defendant or his grantors; that no dwelling-house was erected and no improvement made thereon prior
47 to the survey thereof by the United States government.

To this evidence the defendant objected; the court sustained the objection and excluded the evidence, and the plaintiff duly excepted.

After reading the laws to the jury, under which the plaintiff claims, the plaintiff rested, and defendant introduced the patents and duplicate certificates described in the answer.

Upon the submission of the cause to the jury, the plaintiff requested the court to charge the jury: 1st. That section 18 of the act of March 3d, 1849, being the organic act of the Territory of Minnesota, constituted a reservation and appropriation of all sections therein described, and that by virtue of such appropriation for public uses the title passed out of the United States, and remaining in abeyance until the State was admitted, vested in her.

Second. That such appropriation to public uses so divested the title from the United States as to render any subsequent grant of the same lands by the United States to parties other than the State, void.

Third. That the act of Congress of February 26th, 1857, being the act authorizing the formation of a State government by the people of Minnesota, as modified by the joint resolution of Congress of March 3d, 1857, entitled "A resolution relative to sections sixteen and thirty six, in the Territories of Minnesota, Kansas, and
48 Nebraska," conveyed to the State every section numbered 16 and 36, excepting those sold or otherwise disposed of before the date of said act of February 26th, excepting those settled upon prior to the survey, and that this being the true construction of the grant, the register and receiver of the land office had no authority or jurisdiction, under either of said acts, to determine judicially what lands passed and what did not pass by the grant to the plaintiff.

Fourth. That the joint resolution of March 3d, 1857, when interpreted in connection with the act authorizing the formation of a State government, must be limited in its operation to those lands only which had been reserved from sale in the Territories of Minnesota, Kansas, and Nebraska, and the States thereafter to be carved out of the same, excluding from its operation all lands which had been offered or granted to Minnesota prior to its passage.

Fifth. That the act of February 26th, 1857, if not at the time of the passage of the joint resolution an executed grant, was, at least, a solemn compact which could not be violated without a gross breach of the national faith, and that an act violating a national executory compact is void upon general principles.

Sixth. That the memorial of the Territorial legislature to Congress was passed Feb. 25th, 1856, asking for the passage of the joint resolution of March 3d, 1857, cannot have the effect of making a congressional enactment valid which would otherwise have been
49 void, as the Territorial legislature possessed no power to cede or dispose of school lands, or to bind the State by assent to their diversion from the purpose for which they were granted.

Each and every of the foregoing propositions the judge declined and refused to charge; and to such ruling and refusal, as to each separate request, the plaintiff duly excepted.

The jury, under the charge of the court, found a verdict for the defendant, and judgment was entered accordingly; to all of which plaintiff duly excepted.

Upon reading the foregoing bill of exceptions, the same is allowed.

Dated at chambers, Owatonna, May, 1862.

N. M. DONALDSON,
*Judge Dis. Court, 5th District.*

Endorsed: State of Minnesota. District court, fifth judicial district, Rice county. State of Minnesota ag'st George W. Batchelder. Bill of exceptions. Due service of the within accepted, this 15th day of May, 1862. The same is correct, and we consent to its signature by the judge. Batchelder & Buckham, deft's att'ys. Office of clerk dist. court Rice county, Minnesota. Filed May 20th, 1862. Miles Hollister, clerk. G. E. Cole, pl'ff's att'y.

50 Court record, May Term, 1861—May 16th.

STATE OF MINNESOTA
*against*
GEORGE W. BATCHELDER.

And now comes the defendant and moves the court to grant leave to put in an amended answer. Motion granted, and amended answer put in.

And now comes the plaintiff by attorney and moves the court to grant leave to amend the reply in this action.

Motion granted and amended reply put in.

And now comes the defendant and puts in a demurrer to the amended reply in this action. Upon which it was ordered that said demurrer be sustained, to which plaintiff's counsel excepts.

[May Term, 1862—May 5th, 1862.

STATE OF MINNESOTA
*against*
GEORGE W. BATCHELDER.

This cause being called on for trial, the following jury were impanelled to try said cause: Charles Wood, J. G. Clark, Samuel Lyons, Aseph Sexton, Stephen Ferguson, George S. Woodruff,
51 Lafayette Barlow, Samuel Dunham, J. B. Brailey, Augustus Johnson, E. Q. Rising, Lewis Pierce.

For the purpose of this action, defendant admits that the plaintiff was at the time of the commencement of this action, and still is, in the actual possession of the premises in dispute.

For the purpose of this action plaintiff admits the purchase by the defendant from the pre-emptors of the land in dispute, and the regularity of the appointment of and proceedings by the administrator, and the purchase by defendant from the administrator, and that deeds were duly executed by said pre-emptor and administrator to the defendant, as alleged in the answer.

Plaintiff offered to prove that the said lands were not settled upon by the defendant or his grantors, that no dwelling-house was erected and no improvements made thereon, prior to the survey thereof by the United States government.

To this evidence the defendant objected; court sustained the objection, to which plaintiff excepted.

Counsel for plaintiff read the laws under which plaintiff claims, and rested.

Defendant introduced the patents and duplicate certificates set forth in the answer, and here rested.

The cause having been submitted and jury charged, James Shouts was sworn to take charge of the jury.

52 The jury came into court with the following verdict: We, the jury in the cause of The State of Minnesota against G. W. Batchelder, find a verdict for the defendant.

CHARLES WOOD, *Foreman.*

District court, fifth judicial district.

STATE OF MINNESOTA,
*County of Rice.*

STATE OF MINNESOTA
*against*
GEORGE W. BATCHELDER.

I, Miles Hollister, clerk of the district court in and for said county, in compliance with the annexed "writ of error," do hereby return to the supreme court of said State the foregoing transcript of the judgment roll, bill of exceptions, and record of said cause, now on

file and of record in my office. And I hereby certify that I have compared the same with the original, and that it is a true and correct copy thereof.

Witness the Hon. N. M. Donaldson, judge of the district court for the fifth judicial district, at the clerk's office at Faribault, in said county, this 27th day of May, A. D. 1862.

[SEAL.]

MILES HOLLISTER,
*Clerk Dist. Court Rice Co., Minn.*

53 Endorsed: Rice Co., Minnesota. 455. State of Minnesota, pl'ff in error, against George W. Batchelder, def't in error. Clerk's return. Filed May 30th, 1862.

E. H. BURRETT, *Dep'ty Clerk.*
G. E. COLE,
*Att'y Gen'l, Att'y for Pl'ff in error.*

Supreme court, State of Minnesota.

THE STATE OF MINNESOTA, Pl'ff in error,
*vs.*
GEORGE W. BATCHELDER, Def't in error.

Pursuant to an order of this court, made in vacation and entered herein on this nineteenth day of November, A. D. 1862, wherein it is ordered that the judgment of the court below herein be affirmed:

Now, therefore, it is here and hereby adjudged that the judg-
54 ment of the district court of the fifth judicial district sitting within and for the county of Rice be, and the same is hereby, in all things affirmed, and that the defendant in error above named do recover of the plaintiff in error herein the sum of seven dollars and twenty-five cents ($7 25) for his costs in this court.

Dated and signed this 19th day of November, A. D. 1862, by the court.

Attest:

A. J. VAN VORHES, *Clerk,*
By A. McELRATH, *Deputy.*

STATE OF MINNESOTA,
*Supreme Court, ss:*

I hereby certify that the above is a true and correct copy of the entry of judgment in the cause therein entitled, as the same appears of record in the judgment book of this court.

In witness whereof, I have hereunto set my hand and the seal of said court this 19th day of November, A. D. 1862.

[L. S.]

A. J. VAN VORHES, *Clerk,*
By A. McELRATH, *Deputy.*

55 STATE OF MINNESOTA,
*Supreme Court, ss:*

I, A. J. Van Vorhes, clerk of the said supreme court, in compliance with and in pursuance of the writ of error hereto attached and herewith transmitted, do hereby certify and return to the chief jus-

tice and the associate justices of the Supreme Court of the United States that the foregoing is a true and correct copy of the judgment roll in the cause therein entitled, the same being and containing the record and process in the suit, as the same appears of record in this court; that I have carefully compared the said copy with the original on file as aforesaid, and find the same to be a correct copy thereof. And I further certify and return that in addition thereto the foregoing contains the original writ of error served upon the judges of this court in the said cause, together with the original citation and assignment of errors.

And I further certify and return that final judgment in said cause was rendered and in this court in said cause on the day of which the entry thereof bears date, and that the said rendering and entry of judgment was done and effected less than thirty days previous to the first Monday of December, A. D. 1862.

In witness whereof, I have hereunto set my hand and affixed the seal of our said supreme court, at the city of Saint Paul, in said State of Minnesota, this first day of December, A. D. 1862.

[SEAL.]

A. J. VAN VORHES,
*Clerk Sup. Court Minnesota.*

# Supreme Court of the United States.

*STATE OF MINNESOTA,*
*Plaintiff in Error,*

AGAINST

*GEORGE W. BATCHELDER,*
*Defendant in Error.*

## ARGUMENT FOR PLAINTIFF IN ERROR.

### FIRST.—JURISDICTION.

The right of this Court to entertain jurisdiction of the case at bar will not, probably, be contested.

Lest there may arise doubts on the subject, however, the following suggestions are respectfully submitted:

The case is embraced in the third class of cases mentioned in the 25th section of the Judiciary Act of 1789, viz:

Where is drawn in question any clause of the Constitution, or of a treaty, or statute, or commission, held under the United States, and the decision is against the right, title, privilege or exemption specially set up or claimed by either party under such clause of the constitution, treaty, statute or commission."

It is settled by a long series of decisions in this Court, which it is unnecessary to cite, as they are all reviewed, commented upon and explained in—

*Crowell v. Randall*, 10 *Peters*, 368:

"That it is not necessary that the question should appear on the record to have been raised, and the decision made in direct and positive terms, but that it is sufficient if it appear by clear and necessary intendment that the question must have been raised and must have been decided in order to have induced the judgment."

Neither is it necessary that the treaty or act of Congress under wnich the party claims shall be specially pleaded or spread upon the record.

*Hickey v. Starke*, 1 *Peters*, 94:

Two things must, in the language of Judge Story, be apparent from the record—

1st. That the question stated above did arise in the Court below; and 2nd. That a decision was actually made therein by the same Court, in the manner required by law.

The several questions raised upou the record, the only ones made in the case, and upon all of which the decision was adverse to the State, may be stated as follows:

1st. The construction of the Act of February 26th, 1857, [first clause of reply,] the Plaintiff claiming that all lands not settled upon prior to the survey, passed by that Act to the State upon acceptance by the Convention, the grant taking effect by relation, from the date of the Act, and the fact that the lands in controversy were not settled upon prior to the survey, being admitted by the demurer, judgment should have been rendered for the State.

2nd. The same point made by the offer of evidence [*See First Exception.*] in support of the lawful character of Plaintiff's possession as set forth in the complaint, and of the actual grant as stated in the first clause of the reply. Under the Plaintiff's construction of the grant, that evidence was material, relevant and necessary to the support of his case, and would have determined the action in his favor. In excluding the evidence that construction was rejected, and the evidence therefore pronounced immaterial.

3rd. The same point, conpled with allegations of fraud and perjury, made by the 3rd and 5th clauses of the reply, the allegation that the premises in controversy were not settled upon prior to the survey, is spread upon the record, and was stricken out upon demurrer as immaterial and irrelevant.

4th. Full notice of the Plaintiff's title, and the fraud in the pre-emption, is admitted by the demurrer to the allegation charging notice.

5th. The want of jurisdiction of the Land Officers to allow the pre-emption, because their powers only extend to lands settled on prior to the survey, is set up in the *Seventh clause of the reply*, and the same point is made by the *Fourth Exception*, in the request to the Court to charge the Jury.

The Court by its decision upon this proposition held that power was conferred by the Joint Resolutions upon the Register and Receiver, to decide whether these lands were settled prior to the survey, and to bind the parties by that decision —thus again denying the correctness of our fundamental prop-

osition, that by the prior Act of February 26th, lands not settled prior to the survey, passed to the State, and the title being out of the United States, or the grant taking effect by relation to a period prior to the passage of the Joint Resolution, left nothing to pass by the grant of the ministerial officers of the Government.

But it is urged by the Defendant that this ruling was a construction of the Joint Resolutions merely, and sustained the Defendant's title, set up under them; and therefore the Plaintiff cannot rely upon it as error.

It is apparent that this position is not correct, in fact; the Actof February 26th, was directly misconstrued, although the same is true of the Joint Resolutions.

But admitting that the Joint Resolutions were the only law directly misconstrued, if they are to have any operation, it must be as a modification and condition imposed upon the grant to the State, contained in the Act of February 26th, and they are so treated by the Defendant, who claims that the subsequent acceptance of the proposition contained in the Act of February 26th, was made with reference to the modifications engrafted upon them by the Resolutions. These Acts are, (if the Resolution be valid and applicable to lands in Minnesota,) parts of the same grant, under which both parties claim, and a decision in favor of either against the other upon the construction of any portion of that grant, may be reviewed upon error. They are laws "*in pari materia*," and are to be construed together.

The Act of February 26th grants to the State all sections 16 and 36 not disposed of at the date of that Act.

The Joint Resolutions declare that the title to sections 16 and 36, upon which improvements have been made prior to the survey may be granted to other parties, and thus excepts them from the grant to the State.

Hence the Act of February 26th protects the title of the State to all sections not within the purview of the Resolutions.

But whether the sections within its purview and so granted to the State are all sections settled upon prior to the survey, or all which the Register and Receiver shall decide to be settled, depends upon the construction of the Joint Resolution.

The case upon this point does not differ in principle from—

*Smith v. State of Maryland*, 6 *Cranch*, 286.

*Martin v. Hunter's Lessees*, 1 *Wheaton*, 304.

In those cases the inquiry was whether under the laws of a State such a title existed as was protected by a treaty, and the only difficulty of that inquiry consisted in the interpreta-

tion of State laws and their application to the case, the Court held the construction of the treaty drawn in question, and said, "It may be admitted that the whole difficulty in this case depends upon that part of it which involves the construction of State laws, and that the operation and effect of the treaty which constitutes the residue of the case is obvious so soon as that construction is settled. It is the decision of the title, set up with reference to the treaty, and not the mere abstract construction of the treaty itself, upon which the Statute intends to found the appellate jurisdiction."

It is entirely clear that the correct construction of the Act of February 26th, and the determination of the rights conferred by it can only be ascertained by a reference to and construction of the Joint Resolution. The construction of one enactment is directly dependent upon the other, and it is impossible to separate them, as in order to ascertain what is granted we must first ascertain what is included in the exception, for whatever is included in the exception is excluded from the grant.

6th. The construction of Section 18 of the Act of March 3rd, 1849, is raised and decided by the 2nd and 3rd Exceptions.

But it is contended by the Defendant that this question is not open to us because that Act is not specially pleaded.

The case of *Hickey v. Starke*, 1 *Peters*, 476, is a sufficient answer to this objection.

Another complete answer is that under the allegation of title under the Act of February 26th, the Act of 1849 was pertinent evidence, as whether the title to the lands in dispute vested in the State as alledged, might depend materially upon the power of Congress to grant them to third parties by the Joint Resolutions. and this depended entirely upon whether Congress had been deprived of all power of disposition over them by the Act of 1849. It is also insisted that the language of the first clause of the reply, "the United States then being lawfully possessed as owner in fee simple of said land," is inconsistent with the position taken by us with reference to the Act of 1849, and therefore we are not at liberty to avail ourselves of it.

The language referred to, it will be perceived, is not a traversable fact, but is simply matter of inducement, the object being to fortify the statement of the grant by showing that as against every one but the State, the Government possessed the title and the right to convey it, by that Act, to the State, the Act of February 26th being merely confirmatory and a ratification of that of March 3rd, 1849. But there is no conflict. We rely upon the legal title conveyed to the State

by the Act of February 26th, which we plead, but as against any claim by other persons, we fortify that grant by a prior action of the Government, which we do not claim vested any title in the State, or in any one, at its date, as there was no grantee *in esse* capable of taking under it, but which did so affect the title as to preclude any subsequent grant to any person, or for any purpose different from the original purpose as declared by the Act itself.

The Defendant relies upon the fact that such reservations have been sometimes held dedications to public uses, whereby the title passed out of the Government and remained in abeyance until the existence of a competent grantee.

It is not at all necessary to resort to this fiction of law to support our position. Reservations of this character while uniformly held to estop the Government from making any disposition inconsistent with the original purpose, have quite as frequently been treated as operating as an *estoppel in pais* or in the nature of an executory devise, or as proteeted by the Statute of Elizabeth respecting charitable uses—in all of which cases the legal title remains in the Government until formally vested, in pursuance of the original purpose, in a competent grantee.

See the authorities cited on this point, and the subject further discussed under the first point on the merits.

7th. The Fifth Exception raises the question of the application of the Joint Resolutions to lands within the Teritorial limits of the State, and this also includes the construction of the Act of February 26th, as in order to determine this question, that Act must be examined to ascertain how far the State of Minnesota had been previously erected, and therefore taken out of the purview of the Resolution.

8th. The Sixth Exception relates solely to the construction of the Act of February 26th.

9th. The Seventh Exception raises the question of the construction of the Act of March 3rd, 1849, in relation to the power conferred by it on the Territorial Legislature, with reference to School Lands. This concludes the list of points made and decided in the Court below, and places, we apprehend, the jurisdiction of this Court upon a basis which cannot be shaken.

10th. The character of the action as affected by local law and practice remains to be considered.

The pleadings and practice of Minnesota are modeled upon the New York code. No question was made upon them in the case at bar, and none could have been, as they conform fully to the rules governing that system.

It will be noticed that no demurrer was interposed to the

complaint, and no question made as to its sufficiency.

The action resembles closely the petitory action of Louisiana, and is brought under a peculiar Statute of the State substituting this form of action for a bill in equity to remove a cloud from the title.

It is, perhaps more nearly analagous to the Kentucky Statute enforced by this Court, in

*Clark v. Smith*, 13 *Peters*, 165.

*Sec.* 1, *Chap.* 64, *Compiled Statutes of Minnesota.*

The only facts necessary to constitute a cause of action under this Statute are the actual possession of the land by the Plaintiff in person, or by tenant, (which is expressly admitted on the record, in the case at bar,) and some claim of the Defendant adverse to him of an estate or interest in the land.

*Steele v. Fish*, 2 *Minn.*, 153.

Tnis Statute has frequently been under the consideration of the State Courts, and in the case at bar, and in numerous others, all questions of local law and practice have been as frequently settled in favor of the Plaintiff.

*State v. Batchelder*, 5 *Minn.*, 223.

*Mayhew v. Story*, 6 *Minn.*, 177.

In the case at bar the Court below, in their opinion, (5 *Minn.*, 239,) say: "The Plaintiff has selectd a form of action fully adequate to test the question he seeks to raise."

We are, of course, aware that this Court will not go outside of the record and examine the opinion of the Court below to ascertain the point upon which the case turned; but we are also aware that the decision of the State Courts upon all questions of local law and practice, whether found in the opinion in the case at bar or elsewhere, will be accepted as binding upon this.

*b.* The Bill of Exceptions is taken, signed, allowed, and made a part of the record, pursuant to the Statute and practice in the State of Minnesota.

*Sec.* 22, *Chap.* 71, *Compiled Statutes of Minnesota.*

*Sections* 55, 56, 57 and 75, *Chap.* 61, *Compiled Statutes of Minnesota.*

*c.* The idea of the Defendant that the original reply and demurrer do not constitute part of the record proper, probably requires no answer. We refer, however, to

*Colter v. Greenhagen*, 3 *Minn.*, 131.

22 *N. Y. Reports*, 472.

Under this system of pleading, joinder in demurrer is abolished, and all allegations in the reply not admitted by the demurrer are put in issue by the Statute.

*Van Sanford's Pleadings under the Code.* (789.)

5 *Minn.*, *R.*, 223.

*See generally as to Pleadings under Minnesota Statutes, Sec.* 60 *to* 76, *Page* 539 *to* 542, *Compiled Statutes of Minnesota.*

Under the operation of this system, Equity, as a distinct system being abolished, we may avail ourselves of any objection which could formerly have been taken, either at law or equity.

*Sec.* 19, *et. seq., Page* 480, *Comp. Stat. Minn.*

*Van Sandford's Eq. Prac.,* (*N. Y.*) 18, 20.

5 *Minnesota*, 239.

SECOND.—THE MERITS.

Having disposed of the preliminary questions which may possibly be thought to influence the determination of the action, we enter now upon the discussion of the principles upon which rests the claim of the State of Minnesota to the lands in controversy, and to the magnificent domain donated by Congress to her in trust, for the advancement of learning and education among her people.

Three fundamental propositions must control the decision:

1st. The Joint Resolution of Congress of March 3rd, 1857, is void, and cannot divest or injuriously affect any title which the State would otherwise have acquired.

*Res.* 12, *Page* 664, *U. S. Statutes* 1856–7.

2nd. If not void, it does not extend and apply to school lands within the present territorial limits of the State.

3rd. Conceding its validity and full application, however, it only professed to affect such lands as had been settled upon prior to the survey, and conferred no jurisdiction upon the land officers to determine judicially, as against the State, what lands had been so settled, or to convey or dispose of any lands not within its purview; and any such jurisdiction attempted by such officers may be collaterally assailed in any Court, where rights under their authority are claimed.

1st. Is the Joint Resolution of March 3rd void?

By Section 18 of the Act of Congress of March 3rd, 1849, 9 *U. S. Statutes at large*, 403, known as the Organic Act of the Territory of Minnesota, it is enacted, "That when the lands in said Territory shall be surveyed Sections 16 and 36 shall be, *and the same are* reserved for the purpose of being applied to schools in the said Territory, and in the States and Territories hereafter to be erected out of the same."

It is insisted on behalf of the State that this section constituted a dedication to public uses, perpetual and irrevocable, and whatever might have been its effect upon the naked fee, at least devested Congress of all power of disposition over the subject matter, so far as such disposition should tend to im-

pair the public rights created by that Act.

In order to a more perfect comprehension of the principles upon which this branch of the case depends, it may be permitted us to trace the history of the doctrine of dedication from the narrow limits which it occupied in the English common law to the broad foundations upon which the learning of modern jurists and the decisions of American Courts have placed it.

Dedications of streets, highways, and rights of public passage, are the earliest and most familiar instances of the application of this doctrine, and to these it was, perhaps, confined by the common law.

It was defined to be "the act of devoting or giving property for some proper object, and in such manner as to conclude the owner." From the analogies flowing from this legal principle have probably been deduced the doctrines now generally applied to all interests, rights and titles in or to real property for whatever general purpose set apart or appropriated.

The distinguishing characteristic of a dedication is the absence of any competent grantee *in esse* to take the fee. This difficulty, so apparent under the technical and arbitrary rules governing real estate at common law, was avoided by confining the subject matter of the dedication to mere public easements, as rights of way, streets &c., in which the fee was regarded as residing in the original owner, subject to the right or easement vested in the public. The great interests involved in bequests or donations to charitable, religious and educational purposes, then comparatively in their infancy, received, in the absence of a competent trustee, a doubtful and precarious protection from the Court of Chancery, until the parliament, by the 43rd Elizabeth, known as the Statute of Charitable Uses, provided an efficient mode of enforcing them by informations by the Attorney General.

The relaxation of the laws of real estate incident to an age and country in which land passes from hand to hand with almost the same facility as chattels and donations and reservations of real property for charitable and educational purposes are rapidly increasing in frequency and importance, of which the donations of magnificent domains, by Congress, for the promotion of learning and the liberal arts in the rising communities of the West, afford instances not the least striking and interesting, have induced more liberal views and a wide departure from the narrow limits within which the principle was formerly confined.

It was said by the Supreme Court of Massachusetts, in regard to lands appropriated by the owner for county buildings, that "the objection that the grant was void for uncer-

tainty, for want of a grantee, was untenable; that dedications of land for public purposes might be made without naming a grantee to take immediately upon the same principles and for like reasons, that ways and streets may be and are dedicated to the public."

*Commonwealth v. Fisk, et al*, 8 *Met.*, 243.

The same principle has also been held by the same court applicable to lands granted for religious purposes, no grantee being *in esse*.

*Rice v. Osgood*, 9 *Mass.*, 37.

The Supreme Court of New York, in a learned and elaborate opinion, delivered by Mr. Justice Cowen, in which all the cases are reviewed, while arriving at the conclusion, (in the face, it would seem, of the authorities cited by him,) that a dedication must be confined to a highway, admits that it is well settled by the Supreme Court of the United States, by several Courts of neighboring States, and by the Court of Chancery of his own State, that dedications of land, as well for religious and charitable purposes as for public ways, squares, commons, parks &c., are to be upheld, although there be no person *in esse* capable of taking under the grant.

*Post v. Peirsol*, 20 *Wendell*, 119.

That case, however, turned, not upon the mere question of dedication, but upon the presumption of such dedication arising from user by the public, the Court saying that "If the law has allowed the possibility of a grant without a grantee, and has thus opened a new road to prescription, no one has yet been allowed actually to prescribe in a case wherein the law has heretofore held a grant impossible."

But the doctrine for which we contend has since been adopted by the same court, and a dedication of land to the public for a burying ground, held valid, and that it precluded the owner from exercising his former rights over it.

*Hunter v. Trustees of Sandy Hill*, 6 *Hill* 407.

The case of *Post v. Piersol* was followed and its principles adopted in the late case of *Curtis v. Kesler*, 14 *Barb.* 511, which also turned upon prescription rather than dedication.

The cases in New York cannot be better explained than by a reference to a rule of the common law, which seems chiefly to have influenced and controlled the decisions. As we have said the doctrines of the common law have widely expanded to meet the wants of a community rapidly changing in the nature and magnitude of its business transactions.

In the earlier ages of the common law the doctrine of dedication, even as applied to highways, seems to have been unknown, and interests in real estate could only be acquired by grant or prescription which presumed a grant. It was held at

that period of the law that the public could not acquire an easement by prescription, upon the technical reason that prescription presumes a grant, and in the case of the public there can be no grantee. This principle was seized upon by the Court and applied to the cases under consideration. They do not, therefore so far as the point actually decided is concerned, trench upon the doctrine which we are endeavoring to maintain. It may, however, be remarked in passing, that even this position was combated by Senator Furman, in the same case, in the Court of Errors.

*Post v. Piersol*, 22 *Wendal*, 629, in an opinion of great learning and ability.

The doctrine of dedication in the common law was first announced in *Lade v. Shepherd*, 2 *Strange*, 1004, decided in 1725, and was applied to highways.

This was the first step, forced upon the Courts by the complicated interests of society, in the march of progress, which has resulted in this country in a broad extension of this principle. The ~~capacity~~ with which the common law expands to embrace the advancing interests of community, has ever been the boast of the profession, and is nowhere more finely illustrated than in the history of the origin and progress of the doctrine we are discussing. The doctrine is, therefore, comparatively recent, and, as we have said, was at common law and by the English authorities, much more restricted in its application than in the American Courts. It has, however, even in England, been applied to watering places, quays and rights of towage, and we are aware of no case in which the more extended application for which we contend, has ever been expressly denied. In the Court of Chancery of New York, as intimated, the doctrine of dedication, in its extended application, is firmly established, and was applied to a public square, in

*Trustees of Watertown v. Cowen*, 4 *Paige, Ch.* 510.

And to a dedication for religious purposes, in

*Hartford Baptist Church v. Witherell*, 3 *Paige Ch.* 296.

In Pennsylvania the doctrine was applied to property dedicated for the purposes of general education, in

*Witman v. Lex*, 17 *Sergeant & Rawle*, 88, 91.

In Vermont, to a public square.

*State v. Wilkinson*, 2 *Vt.* 480.

*Abbott v. Mills*, 3 *id.* 521.

*State v. Catlin*, *id.* 530.

Numerous other cases in this State have enunciated the same doctrine.

We come now to the consideration of the cases in this Court, which, with great force of reasoning, have illustrated

and established the analogy between dedications to highways and appropriations of any right or interest in real property to any public use.

It will be seen by an examination of the cases that by a uniform course of decision this Court has fully adopted the doctrine in its broadest and most extended application.

Before proceeding to examine these cases, we may advert to a distinction which may be thought to exist between dedications by Government and individuals.

The principle of dedication in its application to the case at bar being admitted, can Congress divert any portion of the fund thus created from the beneficent objects to which it has been dedicated, and vest a valid title in a purchaser. Under the English constitution, this would not have been within the arbitrary power of the crown *a fortiori*, it cannot exist under the more limited power of our American Governments.

In England the doctrine is established that the crown may dedicate a road to the public and be bound by a long acquiescence in public user.

*Regina v. East Mark*, 11 *Q. B.* 877.

The same doctrine is fully settled in the cases of *Town of Pawtle v. Clark*, and *New Orleans v. United States*, to be presently examined. Indeed there seems to be no sound reasons for any distinction. Independent of written constitutions, the Government, which has conferred a vested interest in real estate, whether by grant or dedication, has devested itself of the title, or has so incumbered the naked fee remaining in it, that nothing remains to pass by a subsequent grant.

The first case in order of time in which the principle of dedication was examined and applied in this Court, is that of *Town of Pawlet v. Clark*, decided in 1815, 9 *Cranch*, 292.

In this case, the King, prior to the revolution, had in the charter creating the township of Pawlet, appropriated one share to the Church of England; no regularly organized Episcopal Church capable of taking under the grant existed. The town, however, was bound by the provincial statutes to maintain public worship, and was therefore interested in the grant, and the lands, say the Court, "could not before the creation of a church, be aliened by the crown withoutits consent, nor afterwards, without the consent of the patron, the parson and the parishioners"

"The land must have passed out of the donors, if at all, by way of public appropriation or donation to pious uses, and under such circumstances, until a parson should be regularly inducted, the title would remain in abeyance."

"Nor is this a novel doctrine at common law. In the familiar case where a man lays out a public street or highway,

there is, strictly speaking, no grantee of the easement, but it takes effect by way of grant or dedication to public uses."

"For the reasons, then, that have been stated, a donation by the crown to the use of a non-existing parish church, may well take effect by the common law. as a dedication to pious uses, *and after such a donation it would not be competent for the crown to resume it at its own will, or alien the property without the same consent, which is necessary for the alienation of other church property.* Under the provincial laws the town constituted the parish, and no church having been erected the legislature of the State vested the title in the town, whose citizens were the beneficiaries of the charity."

The same doctrine was held with reference to the powers of the King of Spain to dispose of land dedicated to public purposes, and the power emphatically denied unless exercised under the right of eminent domain, in

*New Orleans v. United States*, 10 *Peters*, 662, 12 *Curtis*, 292.)

In the *City of Cincinnati v. White's Lessees*, 6 *Peters*, 431, (10 *Curtis*, 179,) the rule is stated very clearly, and the conclusive reasoning of Thompson J., establishes the doctrine, on both principle and authority, upon foundations which have never been, and it is believed cannot be, shaken.

He says: "Dedications of land for public purposes have frequently come under the consideration of this Court, and the objections which have generally been raised against their validity have been the want of a grantee competent to take the title, applying to them the rule which prevails in private grants, that there must be a grantee as well as a grantor.

But this is not the light in which this Court has considered such dedications for public use. It was admitted at the bar that dedications of land for charitable and religious purposes and for public highways, were valid without any grantee to whom the fee could be conveyed. The principle if well founded in the law, must have a general application to all dedications for public use, where there is no grantee *in esse* to take the fee. In this class of cases there may be instances contrary to the general rule, where the fee may remain in abeyance until there is a grantee capable of taking, when the object and purpose of the appropriation looks to a future grantee in whom the fee is to vest. But the validity of the dedication does not depend upon this. *It will preclude the party making the appropriation from asserting any right over the land* —at all events, so long as it remains in public use, *although there may never arise any grantee capable of taking the fee.*"

This principle was recognized and applied to the reservation of a cemetery no grantee being *in esse* to take the fee, in

*Beatty v. Kurtz*, 2 *Peters*, 566.
To a street in the city of Pittsburg, in
*Barclay v. Howell's Lessees*, 6 *Peters*, 498.
To a lot and spring of water, in
*Mc Connell v. Town of Lexington*, 12 *Wheaton*, 582.
To a bequest for the relief of sailors, in
*Inglis v. Trustees of Sailors' Snug Harbor*, 3 *Peters*, 99.

We come now to a class of cases not more analagous in principle, but more exactly in point, so far as the facts are concerned, in which the principle is directly applied to the reservations which we are discussing.

In *Wilcox v. Jackson*, 13 *Peters* 498, with reference to the reservation of Fort Dearborn, the Court say:

"Whenever a tract of land shall have been once legally ap-"propriated to any purpose, from that moment the land thus "appropriated becomes reserved from the mass of the public "lands, and no subsequent law or proclamation, or sale "would be construed to embrace it or to operate upon it, al-"though no reservation were made of it.

"The very act we are now considering will furnish an illus-"tration of this proposition. Thus, in that act there is ex-"pressly reserved from sale the land within that district, which "had been granted to individuals and the State of Illinois.— "Now suppose this reservation had not been made, either in "the law, proclamation or sale, could it be conceived that if "the land were sold at auction, the title of the purchaser "would avail against the individuals or State to whom the "previous grants had been made?

"If, as we suppose, this question must be answered in the "negative, *the same principle will apply to any land which "by authority of law shall have been severed from the public "mass.*"

In the *Trustees of Vincennes University v. State of Indiana*, 14 *How.* 268, the question arose upon the construction of an act reserving a township in each land district in that State, for the use of a seminary of learning, the Court say, "The reservations for seminaries of learning and for schools are made in the same terms, and in some respects must rest on the same principles.

The doctrine of dedication for which we contend was fully applied and enforced in this case, and in the case of

*Gaines v. Nicolson*, 9 *Howard*, 356, the precise point was decided upon a state of facts almost identical with those governing the case at bar.

The case arose under an Act of Congress reserving and appropriating the sixteenth section in each township in the State of Mississippi for the use of schools within the same The

Court held the act sufficient to pass the title.

We have now traced the developement of this doctrine from its origin in dedications for highways, have witnessed its gradual expansion, its successive application to every species of interest of which real property is susceptible, and our researches have terminated in a full and complete enunciation of the doctrine, in connection with the very reservations upon which we rely.

We insist, therefore that by section 18 of the Act of 1849, a charity was created for educational purposes, of which the beneficiaries were the public of the Territory and of the future States to be erected out of it, and that without any further act or legislation the legal title would have vested in the State upon her erection, as executor of the trust, to such portions of the grant as lay within her borders.

*Gaines v. Nicolson*, 9 *Howard*, 156.

*Section 5 of the Act of February* 26, 1857, *U. S. Statutes at Large*, 1856–7, authorizing the people of Minnesota to form a State Government, was but a formal act confirming the previous grant, and vesting by a solemn enactment the legal title in conformity with, and to more effectually execute the purpose of Congress as declared in the Act of 1849.

As we have intimated in the discussion of the question of jurisdiction, it is insisted by the Defendant that the Act of 1849 cannot avail us under our pleadings, as we alledge in the first clause of the reply, "that on the 26th day of February, 1857, the United States then being lawfully possessed as owner in fee simple of the premises, by Act of Congress, approved on that day, granted and conveyed the same to the Plaintiff," while in the Second Exception, we ask the Court to instruct the Jury, "that by virtue of the appropriation of 1849, the title passed out of the United States, and remaining in abeyance until the State was admitted, vested in her."

The Act of 1849, being a public act, need not be pleaded, and we think we have shown in our discussion of the jurisdiction that even in this view of the case there is no conflict between the request and the pleadings.

The Third Exception, however raises the question broadly and does not at all conflict with the pleadings, viz:

"That such appropriation to public uses so devested the title from the United States as to render any subsequent grant of the same lands by the United States, to parties other than the State, void." In pleading we of course selected as the origin of our legal title the confirmatory act which, whatever might have been the effect of the reservation, unmistakably vested the fee in the State. It was unnecessary, however to have pleaded even this, it being a public act, and the complaint

containing no definite allusion to any particular title, left us at liberty to support it by any competent evidence.

But if the act had not been a public act, evidence of the reservation would have been admissible under the pleadings as they stood, as whether the title passed to the State by the Act of February 26th, depended materially upon the validity of the Joint Resolutions of March 3rd, 1857, and that depended upon the construction of the reservation.

Under the Third Exception we proceed now to the inquiry as to the residence of the legal title, the naked fee, during the period between the reservation and the actual vesting of the fee in the State! Upon the adoption of the principle of dedication the Courts found themselves greatly embarrassed by the common law rules, as to the status of the naked fee in these anomalous cases.

This difficulty was soon overcome as to mere public easements such as highways, the courts holding, as we have seen, that the legal title remained in the owner subject to the easement in the public.

But when this principle came to be extended to appropriations which required for their enjoyment the exclusive use and occupancy of the soil and even the possession of the fee itself, there being no grantee competent to take, this difficulty was largely increased, and while courts have sought various means of escape from it the precise principle on which the doctrine rests, does not seem to be definitely settled.

Upon one principle all are agreed, viz: "That all public dedications must be considered with reference to the use for which they are made, and which may require a more enlarged right over the use of the land in order to carry into effect the purposes intended than may be necessary in the appropriation for a highway, but the principle, so far as respects the right of the original owner to disturb the use, must rest on the same ground in all cases, and applies equally to all dedications as to highways."

*Cincinnati v. White's Lessees, cited ante.*

In the earliest case in this Court the fee was treated as in abeyance until there was a grantee capable of taking.

*Town of Pawlet v. Clark, cited ante.*

In *Trustees of Vincennes University v. State of Indiana*, the appropriation is treated indifferently as an executory devise and a dedication to public uses, the title remaining in abeyance.

In *Cincinnati v. White's Lessees.* it is regarded as a dedication to public uses, or an estoppel *in pais.*

In *Inglis v. Sailors' Snug Harbor* it is treated as an executory devise.

And in *Beatty v. Kurtz*, as a charitable use protected by the Statute of Elizabeth.

The State Courts have experienced the same embarrassment and have exhibited the same vacillation which has characterized the decisions of the national tribunals.

The cases of *Trustees of Watertown v. Cowen*, 4 *Paige, Ch. R.*, 510, *and Abbott v. Mills*, 3 *Vermont*, 521, following the analogies drawn from dedications to highways, hold that the legal title, in cases of dedications of public sqnares, remains in the original owner, and the learned editors of the American edition of Smith's Leading Cases, say, "By regarding a dedication, not as transferring a right, but as operating to preclude the owner of the soil from his full enjoyment of his own rights of soil, we get rid of the necessity of inventing an anomalous interest, which passes without any legal ceremony and vests without any legal owner."

*Dovaston v. Paine*, 2 *Smith's Leading Cases*, 212.

In *Hunter v. Trustees of Sandy Hill*, 6 *Hill*, 411, the Court say:

"Dedication, as the term is used in reference to this subject, "is the act of devoting or giving property for some proper "object, and in such manner as to conclude the owner. It is "not at all necessary that the owner should part with the title "which he has, for dedication has respect to the possession and "not to the permanent estate. Its effect is not to deprive a "party of title to his land, but to estop him while the dedica "tion continues in force, from asserting that right of exclu- "sive possession and enjoyment which the owner of the prop- "erty ordinarily has. The principle upon whicn the estoppel "rests is that it would be dishonest, immoral, or indecent, and "in some instances even sacriligious to reclaim at pleasure "property which has been solemnly devoted to the use of the "public, or in furtherance of some charitable or pious object. "The law will not therefore permit any one to break his own "plighted faith to disappoint honest expectations thus excited, "and upon which reliance has been placed. The principle is "one of sound morals and of most obvions equity, and is in the "strictest sense a part of the law of the land. It is known in "all Courts, and may be as well enforced in law as in equity."

In the presence of this conflict of principles we remark, however, the title has been regarded, with the sole exception of the doctrine of abeyance in connection with dedications to public uses, the result is the same in all the cases—the naked fee remains in the original owner, who merely loses his power and control over it, to the extent required by the appropriation.

If we regard it as in the nature of an executory devise, the rules governing it are familiar.

An executory devise having no particular estate to support it could only be created at common law by will, for the technical reason that no grant could take effect without livery of seizin, when created by will therefore there being no livery of seizin the title remained in the grantor and descended to his heirs until the happening of the contingency, a contingent remainder when created by deed, on the other hand, required livery of seizin and this passing the title out of the grantor, the anomalous doctrine of abeyance was resorted to and the inheritance was considered "*in nubibus.*" This fiction of law although ably combated by Mr. Fearne in his work on Remainders—*Fearne on Remainders*, 452. 458, must be regarded as too firmly settled to be shaken, in cases to which it applies. It had no application, however, to conveyances to uses, and in this country where common law conveyancing is abolished, a case can hardly be conceived in which it is necessary to resort to it.

So, too, livery of seizin being no longer necessary to a grant there is no objection to the creation of an executory devise or an estate in the nature of it by deed.

4 *Kent's Comm.*, 257, 284.

By an executory devise then, or a conveyance in the nature of one, a freehold may be made to commence *in futuro*, and needs no particular estate to support it, and the title remains in the grantor until the existence of a grantee capable of taking.

So, if the dedication be regarded as creating a charity, protected by the Statute of Elizabeth, the naked fee would remain in the Government, but the trust would be fixed upon the land, and would follow it into whosever hands it might pass.

But among the various principles suggested by the authorities, the doctrine of estoppel *in pais* seem the least open to objection and to furnish the readiest means of escape from the difficulty without violating any common law rules.

The doctrine of abeyance had its origin in an age of legal fictions, and was even in that age regarded as odious, and was never admitted but from necessity.

The only plausible objection that can be made, as it seems to us, to the application of estoppel to the case at bar, is that estoppels cannot bind the sovereign. This general statement was undoubtedly at one time the language of the English Courts, as was also the doctrine that no one could plead a title by prescription against the king, "*Nullum tempus Occurrit Regi.*" These doctrines rest upon the same principles, and it is doubtful, perhaps, how far they apply to our American Governments.

And in *Beatty v. Kurtz*, as a charitable use protected by the Statute of Elizabeth.

The State Courts have experienced the same embarrassment and have exhibited the same vacillation which has characterized the decisions of the national tribunals.

The cases of *Trustees of Watertown v. Cowen*, 4 *Paige, Ch. R.*, 510, *and Abbott v. Mills*, 3 *Vermont*, 521, following the analogies drawn from dedications to highways, hold that the legal title, in cases of dedications of public squares, remains in the original owner, and the learned editors of the American edition of Smith's Leading Cases, say, "By regarding a dedication, not as transferring a right, but as operating to preclude the owner of the soil from his full enjoyment of his own rights of soil, we get rid of the necessity of inventing an anomalous interest, which passes without any legal ceremony and vests without any legal owner."

*Dovaston v. Paine*, 2 *Smith's Leading Cases*, 212.

In *Hunter v. Trustees of Sandy Hill*, 6 *Hill*, 411, the Court say:

"Dedication, as the term is used in reference to this subject, "is the act of devoting or giving property for some proper "object, and in such manner as to conclude the owner. It is "not at all necessary that the owner should part with the title "which he has, for dedication has respect to the possession and "not to the permanent estate. Its effect is not to deprive a "party of title to his land, but to estop him while the dedica "tion continues in force, from asserting that right of exclu- "sive possession and enjoyment which the owner of the prop- "erty ordinarily has. The principle upon which the estoppel "rests is that it would be dishonest, immoral, or indecent, and "in some instances even sacrilegious to reclaim at pleasure "property which has been solemnly devoted to the use of the "public, or in furtherance of some charitable or pious object. "The law will not therefore permit any one to break his own "plighted faith to disappoint honest expectations thus excited, "and upon which reliance has been placed. The principle is "one of sound morals and of most obvious equity, and is in the "strictest sense a part of the law of the land. It is known in "all Courts, and may be as well enforced in law as in equity."

In the presence of this conflict of principles we remark, however, the title has been regarded, with the sole exception of the doctrine of abeyance in connection with dedications to public uses, the result is the same in all the cases—the naked fee remains in the original owner, who merely loses his power and control over it, to the extent required by the appropriation.

If we regard it as in the nature of an executory devise, the rules governing it are familiar.

An executory devise having no particular estate to support it could only be created at common law by will, for the technical reason that no grant could take effect without livery of seizin, when created by will therefore there being no livery of seizin the title remained in the grantor and descended to his heirs until the happening of the contingency, a contingent remainder when created by deed, on the other hand, required livery of seizin and this passing the title out of the grantor, the anomalous doctrine of abeyance was resorted to and the inheritance was considered "*in nubibus.*" This fiction of law although ably combated by Mr. Fearne in his work on Remainders—*Fearne on Remainders*, 452. 458, must be regarded as too firmly settled to be shaken, in cases to which it applies. It had no application, however, to conveyances to uses, and in this country where common law conveyancing is abolished, a case can hardly be conceived in which it is necessary to resort to it.

So, too, livery of seizin being no longer necessary to a grant there is no objection to the creation of an executory devise or an estate in the nature of it by deed.

4 *Kent's Comm.*, 257, 284.

By an executory devise then, or a conveyance in the nature of one, a freehold may be made to commence *in futuro*, and needs no particular estate to support it, and the title remains in the grantor until the existence of a grantee capable of taking.

So, if the dedication be regarded as creating a charity, protected by the Statute of Elizabeth, the naked fee would remain in the Government, but the trust would be fixed upon the land, and would follow it into whosever hands it might pass.

But among the various principles suggested by the authorities, the doctrine of estoppel *in pais* seem the least open to objection and to furnish the readiest means of escape from the difficulty without violating any common law rules.

The doctrine of abeyance had its origin in an age of legal fictions, and was even in that age regarded as odious, and was never admitted but from necessity.

The only plausible objection that can be made, as it seems to us, to the application of estoppel to the case at bar, is that estoppels cannot bind the sovereign. This general statement was undoubtedly at one time the language of the English Courts, as was also the doctrine that no one could plead a title by prescription against the king, "*Nullum tempus Occurrit Regi.*" These doctrines rest upon the same principles, and it is doubtful, perhaps, how far they apply to our American Governments.

The principle, however, so far as its application to dedications is concerned, may be, as to the king, considered as exploded, it having been expressly decided in England that the crown may dedicate a road to the public and be bound by long acquiescence in public user.

*Regina v. Eastmark*, 112, *B.*, 877.

The language quoted *ante* from the decision of the Court, in *Hunter v. Trustees of Sandy Hill*, seems applicable to the case at bar.

The prosperity of the nation has ever been regarded as closely identified with the rapid developement of the valley of the Mississippi and the speedy settlement of the magnificent domain which is watered by its tributaries. As an incentive to this desirable object a wise and liberal policy was early adopted by the Goverment with reference to the public lands.

No stronger inducement to the American emigrant could be presented than the splendid endowments from the choicest of the public lands for the dissemination of learning and intelligence among the settlers of the West and their posterity. Upon the organization of the Territory of Minnesota, therefore, the Government, impressed with the national benefits which had flowed from this source, granted or reserved for the benefit of those who should inhabit her soil a much larger and more liberal donation than had been bestowed upon her sister States of the West.

The results of this generosity were speedily apparent. Minnesota, notwithstanding her northern latitude and rigorous climate, has advanced from a wilderness to a populous and prosperous community, with a rapidity which has no parallel in the annals of Western emigration. It is idle to deny that the thousands who have left happy Eastern homes to endure the hardships of frontier life upon herborders, have been largely influenced by the promises of the Government of a magnificent and inviolable school fund.

Has not the faith of the Government been plighted? have not honest expectations been excited? and would it not be dishonest and immoral to reclaim property thus solemnly dedicated to the promotion of one of the most important interests of society? and are not these precisely the principles upon which the doctrine of estoppel rests?

We have shown by authorities of the highest consideration, then, that unless there exists some exception which can operate to withdraw the case at bar from the general rule governing all reservations for public purposes, it was not competent for Congress to divert the premises in dispute from the purposes to which they had been dedicated.

But two possible answers occur to us.

1st. It may be said that the language of the Act of March 3rd, 1849, "That when the lands in said Territory shall be surveyed," postpones the operations of the reservation until the survey, and that parties locating thereon, previous to that time, under the sanction of the Government, acquired equities prior to, and which take precedence to the rights of the public.

The language of the act, "Shall be *and the same are hereby reserved*," repels this inference, the latter clause being entirely unnecessary and superfluous, unless it were the intention of Congress to make a *present reservation* of certain sections, the words "when the lands shall be surveyed," merely referring to the period when the sections so reserved should become capable of definite description by the survey.

The cases of *Gaines v. Nicolson*, and *Trustees of Vinceenes University v. State of Indiana*, cited *ante*, sustain this construction.

But it is not true that persons settling on lands prior to the survey were encouraged to do so, by the expectation of retaining their claim, should it happen to fall upon lands reserved for school purposes. On the contrary the uniform policy of the Government had been to allow the settler so situated to select other lands in lieu of those thus appropriated; and the Joint Resolutions of March 3rd, 1857, were the first intimation of a change of policy. At the time of the passage of the Act of August 4th, 1854, extending the right of pre-emption over unsurveyed lands in Minnesota, two acts were in existence, viz: the Act of June 1st, 1840, and the Act of March 3rd, 1843, expressly declaring the right of the settler, not to retain the claim, but to select other lands in lieu of those thus taken. Every settler upon unsurveyed lands therefore voluntarily makes his claim subject to this contingency.

2nd. It will be urged on the part of the Defendant that the Joint Resolutions of March 3rd, 1857, was passed at the express solicitation and request of the Legislature of the Territory of Minnesota.

It is true that on the 26th of February, A. D. 1856, in a time of extreme speculative exeitement, a Legislature which appears to have been fruitful in memorials, did make a request of this character. See page 368, Laws of 1856.

The powers of the Territorial Legislature are derived from the Act of March 3rd, 1849, which nowhere confers, either expressly or by implication any power upon them to legislate in any manner respecting the School Lands within the territorial limits. On the other hand, the language of Section 18 indicates an intention to consecrate these lands for the bene-

fit of the generations who should in future inhabit the State, and while devesting Congress of all power of disposition over them to withhold it from any other body then in existence. They are reserved "for the purpose of being applied to schools in said Territory, *and in the States and Territories hereafter to be erected out of the same.* They were not granted to the Territory, and were in no sense its property. It was a dedication to a public purpose, and no intention is manifest or can be reasonably inferred, to make the Territorial Legislature the trustees of the charity. This conclusion, which is irresistable from the Act itself, is further strengthened and confirmed by the Act of February 19th, 1851, conferring upon the Governor and Legislature the power to make laws and needful regulations to protect Sections 16 and 36 from injury and waste.

9 *Stat.*, 558.

Had a general power and control over these lands been vested in them, extending to the absolute right of disposal, it would have included the minor and incidental power of protection. The fact that Congress deemed it necessary to confer this limited power upon the Legislature, conclusively proves that no power vested in them in the absence of express enactment, and then, only so far as conferred by the terms of the Act. By referring to the Constitution of the State, it will be seen that the people have deemed it necessary to impose the most cautious restrictions upon their legislatures, with reference to these lands, and have incorporated into the fundamental law the time-honored maxim of the Government, viz: that the lands granted for the use of schools in this State shall remain a perpetual school fund. In view of these facts, it would be folly to suppose that Congress should have so abandoned and ignored a principle so often, and so ably announced, by her judicial tribunals, as to have exposed an interest of this importance to the mercy of a reckless Territorial Legislature, untrammeled by constitutional restrictions.

We have seen in the review of the case of *Pawlet v. Clark*, cited *ante*, that after a dedication has been made to public uses, no grantee being *in esse*, it can only be aliened by the consent of the beneficiaries, viz: in this instance, the people of the State. It was there held that after the erection of a church the assent of the patron, (that is, the crown,) the parson, (in whom the title was vested,) and the parishioners, (the beneficiaries,) must concurto give validity to a subsequent grant. The parson, although holding the fee, could not bind the parishioners by his assent. Here the people did not and could not confer such power upon their legislature, the powers of that body being only such as were conferred by the or-

ganic act, which did not emanate from the people, and from which alone they derived their legal existence.

A third objection is suggested by the Court below. Admitting that it was not competent for the Territorial Legislature to bind the public by its assent to the diversion of School Lands from the purposes for which they were reserved, it is insisted that inasmuch as certain propositions, including the grant of sections 16 and 33 were offered to the Convention of Minnesota for its free acceptance or rejection, and which, if accepted, should be binding on the United States and the State of Minnesota, which propositions were, as it is claimed, modified by the Joint Resolutions of March, the Convention has accepted the modified propositions, and ratified the action of Congress in this regard.

This proposition would, if true in the manner in which it is stated, be plausible, if not sound; but the fallacy and falsity of the statement is easily exposed.

It may be true that the propositions contained in the Enabling Act were, until they had become an executed grant by acceptance, revocable. That is, the minds of the contracting parties, if the expression is allowable, not having met, no compact existed, and if, in the mean time, Congress had disposed of every acre of these lands, the purchaser, (had the title of the State, depended entirely upon the Act of 1857,) would have acquired a good title, and the State, as against him, been without remedy. The want of right and the bad faith of the transaction would be apparent, but the power could not be denied. The legal effect of it would of course be to destroy the efficacy of the propositions, by withdrawing from them the subject matter on which they were to act. But will it be contended that had all these lands been absolutely disposed of to another party, the State would be held to have waived all objections by proceeding to accept the original propositions in the terms in which they were submitted? If so, she is placed in this dilemma: she must reject the propositions and get nothing, *because* she rejects them; or she must accept them and get nothing, because by so doing she assents to the action of Congress.

Had Congress withdrawn the original offer and submitted other formal propositions in its place prior to the acceptance of the first, the case would be altogether different.

It is true that in discussing some portions of this case, we treat the Joint Resolutions as a modification of the original grant; that is, assuming them to be valid, their legal effect was to withdraw a portion of the lands from the operation of the grant. The effect of the executed grant is modified and restrained by them. The propositions were not modified or

affected by them. The Act of February 26th was an offer made directly to the State, and was in terms accepted by the Convention. *Sec. 3rd Article, 2 Constitution of Minnesota.*

The Joint resolutions are *res inter alios;* they do not allude to or profess to modify the propositions to the State, and no allusion is made to them by the Convention, in accepting the original propositions. These propositions were to be binding upon the United States if accepted by the State, and no intimation was given to the State of any intention to withdraw them.

Certainly a proposition made by an individual and accepted before it is withdrawn will constitute a valid and binding contract according to its terms, notwithstanding that the party making it may have, between the date of the proposition and its acceptance, put compliance out of his power.

But the present case is still stronger, A formal proposition was made to the State, and a definite and specified time given her for acceptance, to wit: until the assembling of the Constitutional Convention, but without sufficient delay to enable the State to take any action in the matter, and without notifying her of its withdrawal, Congress, as contended by the Defendant, proceeded to dispose of the most valuable portion of the grant to other parties.

In cases of contracts between indivividuals, it is said that the acceptance, though by delay or accident the letter of acceptance does not arrive at the usual time and the *subject matter of the contract has in the mean time been sold to a third darty, is still good and binding.*

2 *Kent's Com.*, 607, *note* 7.

But even the admission that it was *competent* for Congress to withdraw the offer, even by a formal notice of such intention to the State, may be conceding too much.

In *Cook v. Oxley*, 3 *Term Rep.*, 653, it was held that if A make an offer to B, and gives him a definite time for an answer, A may retract before the offer is accepted, on the ground that until both parties are agreed it is no contract.

But this doctrine has received the emphatic condemnation of Chancellor Kent. He says: "The good faith and justice of the case would lead to the conclusion that if A who makes the offer gives B a specified time to accept, and he accepts within the time, it becomes a valid contract, and A is bound by his offer, which left it optional to B to accept or reject the offer within the time."

He Continues: "The criticisms which have been made upon the case of *Cooke v. Oxley* are sufficient to destroy its authority."

2 *Kents Com., 7th Ed.*, 478, (*marginal paging,*) *note a*—

417, *note* 1, (607 *top paging*.)

We insist, therefore, that so far from ratifying the action of Congress in this particular, the acceptance of the original proposition, assuming the Joint Resolution to be valid, gave the State a strong, equitable, and legal claim on the United States for reimbursement for any damages sustained by her.

The principles governing offers and acceptances between private parties must control the consideration of this question, unless it be held that those salutary rules which regulate private contracts and enforce good faith between the contracting parties, are not obligatory when States and nations are the parties concerned. The analogy is perfect, and the law is emphatically laid down as stated above, in

1 *Parsons on Contracts*, 403–4.

And by all the elementary text writers; see also

*Mactier's Adms. v. Frith*, 6 *Wendell*, 103.

But there is a further and conclusive answer. The whole argument based upon the effect of the Memorial, and of the action of the Constitutional Convention, rests upon an entire misapprehension of the nature of a dedication and the residence of the fee.

The Defendants treat the reservation as passing the title to the people of the State or Territory in their sovereign or collective capacity.

It would be sufficient to say of the Memorial that the reservation is for the support of schools in the Territory *and the States and Territories thereafter to be erected out of the same* —admitting that the Territorial Legislature might bind the people of the Territory, they could not claim to affect that much larger class of beneficiaries, who take, if they take at all, direct from the Government, and not as successors to the people of the Territory. The benefits intended to be conferred by the reservation were prospective, and were intended to apply to a prospective class of beneficiaries, whose rights could not be affected by the acts of the few who in the early days of the Territory might happen to inhabit it.

But it might be stated generally that a dedication to a public use vests no beneficiary interest in the public authorities of the district, and confers upon them no right to use or dispose of the subject of such appropriation in any other manner or for any other purpose than that to which it is reserved.

The very objection which was made to the extension of the doctrine of dedication to any purpose but highways, was upon the ground that there would be no one to release it—no one to discontinue or discharge it.

*Post v. Piersol*, 20 *Wend.*, 126.

Thus, in *Pomeroy v. Mills*, 3 *Vermont*, 279, it was held

that the town authorities had no right to assume or grant exclusive possession of a public square dedicated to the public use of the town.

So, in *State of Alabama v. Mayor and Aldermen of Mobile*, 5 *Porter*, 279, it was held that the city corporation had no right to build market houses in a street dedicated to the public, and that they might be abated as a public nuisance.

In *Commonwealth v. Alburque, et al*, 1 *Wharton*, 469, it was said: "When property is dedicated to the public use the use is indefinite, and may vary, according to circumstances. The public not being able themselves to manage or attend to it the care and employment of it must devolve upon some local authority or body corporate, as its guardian, who are in the first instance to determine what use of it from time to time is best calculated for the public interest, subject, as charitable uses are, to the control of the law and the Courts, in case of any abuse or misapplication of the trust. *the corporation has not the right to these squares, so as to be able to sell them or employ them in a way variant from the object for which they were designed.*

In *Commonwealth v. Rowan*, 3 *Barr.*, 203–6, it is said the public square is as much a highway as a street, and neither the county nor *the public* can block it up to the prejudice of the public or an individual, nor can *either* assume a right to it by enclosing it beyond the limits of a reasonable curtilage. It is dedicated to the use of *all the citizens* as a highway, and *all* have a right to pass over it without unreasonable let or hindrance.

This case puts a quietus to another desperate expedient which has been resorted to to escape the consequences flowing from these established principles.

It has been said that if the assent of the beneficiaries is indeed necessary to a diversion of the lands in controversy from the purposes for which they were reserved, that the Constitutional Convention accepted the propositions contained in the act authorizing the people of the State to form a State Government, subject to the Joint Resolutions of March 3rd, 1857, which excepted certain lands from the grant, and that the people, by ratifying the Constitution at the polls, have thereby given their assent. We have shown that the action of the Constitutional Convention had no reference to the Resolutions, but if it had, the present position is so extravagant as to hardly require an answer.

By the last case, however, it is settled that even the public (by which we mean a majority of the people) have no more power to divert the premises from their legitimate objects than the State or Nation acting in their corporate capacities.

The grant is to the public severally. Every individual of that public has a vested right in this munificent donation that the tyranny of the majorities cannot wrest from him.

2nd. If not void, the Joint Resolution of March 3rd does not extend and apply to school lands within the present territorial limits of the State.

On the 26th of February, 1857, in the Act authorizing a State Government, Congress entered into a solemn compact with the people of the State, whereby every section numbered 16 and 36, within her borders, as defined by that Act, not previously disposed of, were offered to the State with the implied condition that she was to have until the assembling of her Convention, under the act, to accept or reject the proposition embraced by such offer; and this indeed was expressly stipulated in the agreement that, if accepted, the propositions should be obligatory upon the United States.

This act was simply a continuance of the policy adopted by the United States in its dealings with Minnesota, in the Act of March 3rd, 1849, and its sole object was to vest that title which before had remained in abeyance for want of a grantee *in esse*, in the State, as executor in the trust. That it had the effect of a present grant, will be seen by a reference to the decision of the Secretary of the Interior, under date of September 10th, 1857, upon the Enabling act of Michigan, published on

*Page* 194, *Lester's Land Laws*;

Also, *Cooper v. Roberts*, 18 *Howard*, 173;

*Ham v. State of Missouri*, 18 *Howard*, 126.

It will be urged, however, by the Defendant, that the Act of February 26th did not profess to offer or convey to the State any lands except such as should remain undisposed of at the acceptance of those propositions by the State.

This proposition is unsupported by the language employed. After granting sections 16 and 36, it proceeds: "And when either of said sections or any part thereof *has been* sold or otherwise disposed of, other lands, &c., shall be granted." The term "has been" has reference to the date of the passage of the act. Had the date of acceptance been the time referred to, the words "shall have been" would have been used. On acceptance, therefore, the title vested in the State to all lands embraced in the grant not disposed of on the 26th of February, from which time the conveyance took effect by relation. That the words "shall be granted" are apt words to denote a present grant, see

*Rutherford v. Greene's heirs*, 2 *Wheaton*, 196, (4 *Curtis*, 73.)

For our present purpose it will be sufficient to treat it as

an offer to the State, without consideration, and not *binding*, as an executed grant, until its acceptance.

On March 3rd, 1857, only a week afterwards, and while this solemn agreement was fresh in the memory of every member the Joint Resolution was adopted, containing not the most remote reference to the grant and compact of the previous week. Had it been intended to have thus vitally affected that grant, can it for a moment be supposed that an allusion to, and express modification of, its terms by an amendatory enactment or in the Resolutions themselves, would have been omitted? It is a principle of law that appeals by implication are disfavored and are never to be presumed; that unless the two enactments are utterly and absolutely unreconcilable, the one with the other, both will be allowed to stand, *a fortiori*, then should this rule apply in its full force to a case in which the result of a different construction would imply a gross violation of the plighted faith of the nation. But the Joint Resolution will admit of a different construction which will give full force and effect to every clause, and leave the Act of February 26th intact.

The resolutions declare "that whenever any settlements, &c., shall have been made upon sections 16 and 36, which sections shall have been reserved for the support of schools, in the Territories of Minnesota, Kansas and Nebraska, and in the States and Territories *hereafter to be erected* out of the same, then" &c.

Reading this law in connection with the Act of February 26th, and acting upon the presumption that in the absence of express language the repeal or modification of the latter was not intended, the construction will depend upon the meaning of the term *erected*, as used in the Joint Resolution.

The people of the State derive the sole power to organize a State Government from Congress. In this Act are defined the limits of the future State and the restrictions under which she is to be admitted into the Union. The acts of the Convention and the subsequent Act of Congress, formally admitting her, all derive their force and have relation to the Act authorizing the formation of a State Government.

The State of Minnesota was, we apprehend, erected within the meaning of the word as here used, prior to the passage of the Joint Resolution; certainly the work of erection had commenced. The acts of the Convention cannot be said to constitute the erection, for they, without the authority and assent of Congress, would be nullities. The act formally admitting the State is not an erection; it is a mere formal recognition of the regularity and validity of the prior proceedings. If any step in the proceedings, more than another, can be so re-

garded, it is the Act of Congress separating a portion of the Territory of Minnesota from the remainder, and designating it as the future State, subject to the assent of its inhabitants. The boundaries and name were thus fixed one week prior to the passage of the Joint Resolution of March 3rd, 1857. With this construction the Resolution will have full application to that part of the Territory of Minnesota not included within the limits which Congress had marked out and entitled the State of Minnesota, and to the Territories of Kansas and Nebraska. We regard this construction as the most reasonable; but if it were doubtful, the fact of the passage of the Resolution so recently after the Act of February 26th, with no allusion to the latter, and the presumption that Congress having made an offer to the people of the State, and given them a certain period within which to accept or reject it, would not, before an opportunity had been afforded to the State to signify her acceptance, withdraw or materially change it, are sufficient to enforce the construction which we urge.

We are not, however, without authority in support of our position.

In *Wilcox v. Jackson*, 13 *Peters*, 498, (13 *Curtis*, 266,) the Court had occasion to apply the principle of construction for which we contend. They say, in answer to the claim of the Plaintiff, "The very Act of June 19th, 1834, under which this claim is made, was passed but *one week before the one of which we are now speaking*, (which is exactly our case,) *thus showing that the provisions of the one were not intended to have any effect upon the subject matter upon which the other operated.*"

The Court continue, "But we go further and say that whenever a tract of land shall have once been legally appropriated to any purpose, from that moment the land thus appropriated becomes severed from the public mass, *and that no subsequent law or proclamation or sale would be construed to embrace it, or to operate upon it, although no reservation were made of it.*" Whether the propositions of Congress were a technical grant or not, it cannot be doubted that the sections mentioned were by their terms legally oppropriated to a specific object. The case is, therefore, within the reason and letter of the decision.

We shall be reminded however, that the fact that those resolutions were passed at the express request of the Territorial Legislature refutes our argument and conclusively establishes the intention of Congress, by granting that request to except these lands from the grant to the State.

There is no evidence or presumption that the Joint Resolutions were induced by the Memorial of the Territorial Legis-

lature. On the other hand the presumption is directly to the contrary. That Memorial was passed in February, 1856, one year before the offer of *all* School Lands not then disposed of was made to the State. No allusion is made to it in the Joint Resolutions and the presumption almost amounts to a legal certainty that if Congress had intended to comply with that request so far as the future State was concerned, they would have adopted the only appropriate method of compliance by incorporating a provision to that effect in the grant to the State. The fact that with that Memorial before them, they proceeded to grant all School Sections unqualifiedly to the State, conclusively shows that they did not intend to apply it to the State then in process of erection, and the passage of the resolutions a week afterwards shows simply that they did intend to adopt that policy for the future as to States which had not as yet taken the initiatory steps for admission into the Union.

We have now arrived at the third and last point upon which we rest our case.

3rd, Conceding the validity and application of the Joint Resolution, it only professes to effect such lands as had been settled on prior to the survey, and conferred no jurisdiction upon the Register and Receiver of the Land Office to determine judicially as against the State, what lands had been so settled, or to convey or dispose of any lands not within its purview, and any such jurisdiction attempted by such officers, may be collaterally assailed in any court where rights under their authority are claimed.

The Register and Receiver of the local land office it is insisted acted in allowing the pre-emption in the case at bar and granting lands to the Defendant in Error, on the 15th of August, 1857, which by the act of February 26th, had been offered to the State, and as to which not having been settled on prior tothe survey that offer had not been withdrawn or modified by the Joint Resolution of March 3rd, simply as ministerial officers. The validity of their action depends solely upon the construction of the law under which they acted, and the question is to be examined without any reference to any opinion entertained by them in the matter.

If they have granted lands already granted to the State, if by reason of accident, mistake, fraud or misrepresentation, they have violated the law, it is the common case of acts of Government agents without authority, and their acts are simply void.

Assuming the Joint Resolutions to be valid, they withdrew all lands settled upon prior to the survey, from the offer made to the State in February preceding; as to all others the offer

remained unaffected, and by its acceptance in September, 1857, by the Constitutional Convention, the grant before inchoate was consummated and took effect by relation from the date of the act of February 26th, without any reference to the action of the Government agents in the interim who were utterly powerless, by any action of theirs, to affect, modify or control the plain legal principles flowing from this action on the part of the State and National Government.

The cases cited hereafter will illustrate this proposition more fully if illustration indeed be needed.

It is contended however by the Defendant in Error that the land officers are, under the pre-emption law, invested with certain judicial functions, and that therefore their decision of the question is conclusive and cannot be assailed collaterally.

It is perhaps immaterial whether we regard them as ministerial officers or as a tribunal invested with quasi judicial functions, which has exceeded its powers and acted beyond and outside of the authority vested in it by law. A court passing beyond the limits of its jurisdiction ceases to be a court, and all distinction between its acts and those of a ministerial officer is destroyed.

We are therefore entirely willing to discuss the case in thi aspect.

The proposition is upon principle too plain and has been too often determined by this court to require any extended argument that the acts and judgments of all courts and especially those exercising a limited and statutory jurisdiction unknown to the common law, acting without jurisdiction are simply nullities and that the question is always and everywhere open to inquiry.

It may be premised that the Register and Receiver are merely ministerial officers, invested as to one single subject, and as between certain parties only, (as we shall hereafter see) with the most limited judicial functions, as a court of special and limited powers, jurisdiction is not to be presumed: nothing is to be taken by intendment, all must be proved by the party claiming under their acts. But conceding to them the fullest powers of a judicial tribunal, we maintain, in the language of the court in *Elliot v. Piersol*, 1 *Peters*, 328, (7 *Curtis*, 601) "that the jurisdiction of any court, exercising authority over a subject, may be inquired into in every court where the proceedings of the former are relied on and brought before the latter by the party claiming the benefit of such proceedings. If they act without authority, their judgments are nullities; not voidable, but simply void."

*In Rose against Himely*, 4 *Cranch*, 241, (2 *Curtis*, 87) "The court held that the jurisdiction may be assailed, collat-

"erally, not only as to the constitution of the court, but that "the situation of the particular thing on which the sentence "is passed, may be inquired into for the purpose of deciding "whether the thing was in a state which subjected it to the "jurisdiction of any court passing sentence."

This is precisely what is sought here, viz: to inquire whether these lands were settled upon prior to the survey. If so they are in a state which subjects them to the jurisdiction of the court, if not, not. It is true this was a foreign judgement, but is cited with approbation by the same court in *Williamson v. Berry*, 8 *Howard*, 495 (2 *Curtis* 669), as enunciating the rule applicable to all judgements.

See also *Shrivers' Lessees, v. Lyme*, 2 *Howard*, 59.

*Lessees of Hickey v. Stewart, et al*, 3 *Howard*, 750.

*Latham v. Edgerton*, 9 *Cowan*, 227.

*Chemung Canal Bank v. Judson*, 4 *Selden*, 254.

The case of *Rogers v. Dill*, 6 *Hill*, 451, is in point.

The statute conferred authority upon the chancellor to decree the sale of lands of a minor, "whenever it should appear that the interests of the infants would be promoted thereby; but provided, "that nothing contained in this act should authorize the sale or disposition of any lands or terms against the provisions of any last will or conveyance." The chancellor had decreed a sale. The devisees brought *ejectment* against the purchaser, who set up the decree in bar. The court say, "The case (the sale having been prohibited by "will) is expressly excepted from the grant of powers; the "order authorizing the sale was utterly void; the chancellor "was as destitute of jurisdiction as if no statute had ever ex- "isted."

Here the will was examined to ascertain whether the lands were in a state subjecting them to the jurisdiction of the chancellor. We seek to inquire whether the lands in dispute were subject to the jurisdiction of the Register and Receiver. If settled on prior to the survey they were. If not, in the langurge of the Court last cited, the officers were as destitute of jurisdiction as if no statute had ever existed. The statute in that case authorized the sale of lands under certain conditions, viz: If the sale was not prohibited by the will. The statute in this case authorized the sale of land to Defendant's grantor, under certain conditions, that is: if settled upon prior to the survey. The chancellor in that case necessarily decided upon the provisions of the will before he decreed the sale, as in this, the officers must determine, (as it is argued,) the fact of prior settlement, before they can allow the pre-emption; but in either case an erronious decision upon the preliminary question binds no one.

In all cases, it is said, where the right of an inferior court to decide is either wholely collateral to the merits of the controversy, or *severable from them*, it is well settled that its decision will remain open upon the former question, although conclusive on the latter. Thus, in the case of *Bunbury v. Fuller*, 6 *Exchequer*, 111, it was held that although a commissioner, who had been appointed to determine questions of tithe, but who was expressly restricted from passing upon tithes which had been commuted or extinguished, might decide in the first instance, whether particular tithes were within the restriction or not; his decision was not final, and upon subsequent proof being given that they were the whole proceedings, would be held *coram non judice* and void.

How can this case be distinguished from the case at bar?

By the Act of 1841—*Sec.* 10, 5 *Statutes* 455, the Land Officers were expressly prohibited from allowing pre-emptions upon lands reserved for the support of schools. By the Joint Resolution they were permitted to allow such pre-emptions upon school lands *only* settled on prior to the survey. As to others the prohibition continued; they must in the first instance decide whether the particular lands are within the restriction. If, then, subsequent proof is given that they were, why shall not their whole proceedings be held *coram non judice*, and void?

We now address ourselves to the inquiry as to whether the Land Officers in this instance were authorized to conclude the state by the adjudication in question.

We have seen that by the act of March third, 1849, Congress withdrew all sections designated 16 and 36 from the public mass, liable to sale, and from the jurisdiction of the land officers, and reserved them for a specific purpose.

Section 10, of the act of September 4th, 1841, (5 *Stat.* 455,) declares "that no lands reserved for the support of schools shall be liable to entry under this act."

It will not be denied, then, that if the Register and Receiver had allowed a pre-emption upon one of these sections, prior to the resolution of March third, 1857, it would have been in defiance of law, and simply a nullity, absolutely void everywhere.—See 13 *Peters*, 498.

How, then, was this act affected by the joint resolution?

It declares, "that when any settlement by the erection of a dwelling house or the cultivation of any portion of the land, *prior to the survey*, shall have been made upon sections 16 and 36, which have been reserved by law, &c. Then other lands shall be selected by the proper authorities, and if *such settler* can bring himself within the act of September 4th, 1841, then the right of preference in the purchase of sections 16 and 36, granted by the

pre-emption law, shall be in him as if *such* sections had not been reserved.—*Res.* 12, *p* 234, *U. S Statutes at large*, 1856–57.

It will be noticed that this resolution contains two distinct clauses.

The first descriptive of the land taken out of the general rule applicable to school sections. The second providing that *such settler*, (viz: one who has settled prior to the survey.) if he can bring himself within the pre-emption law, may pre-empt. Lands not settled upon in that manner, are still reserved. Certain lands are withdrawn from the reservation and restored to the jurisdiction of the land officers, leaving the status of the remainder unchanged; that is, still subject to the act of 1849, and the prohibitory clause of that of 1841. Does not, then, the jurisdiction of the officers over the land in dispute, depend solely upon the question as to whether these lands have been restored to the public mass, and does not that depend upon the fact of prior settlement? If so, how can it be said that the decision of the officers is conclusive? If this be true, they may decide that they have jurisdiction to sell and convey university, swamp, railroad lands, lands reserved for military purposes, in short, bidding defiance to law, they may determine all reservations of no valid; and the entire public domain will be placed at the mercy of the subordinate ministerial officers of the Government.

But a more minute examination of the joint resolution, in connection with the pre-emption law of September, 1841, will establish our position beyond controversy.

It is urged by the defendant that by and in the grant itself the Register and Receiver were constituted the tribunal to determine upon the question of settlement prior to the survey?

There is not one syllable in the law sanctioning this position; but, on the other hand, it is repelled by reason, authority, and the express letter of the Statute.

We admit that the enabling act and the joint resolutions should be read in connection and regarded as *the grant*. As all sections designated by the numbers 16 and 36 were offered to the State by the enabling act, and as by the joint resolutions an exception was engrafted upon that grant, the true construction of the two acts will pass to the State all of those sections not settled upon prior to the survey, leaving the remainder still at the disposal of the Government, and under the jurisdiction of its officers. If, therefore, the joint resolutions vest power in the Register and Receiver to decide what lands were within the exception and what passed to the State, we concede for the purpose of the argument that the assent of the State might be inferred. Unless this provision, however, is to be found in the grant, and so assented to by the State, it would not be competent for the United States to compel the State to submit questions of title,

able property in the State, incapable of definite and precise description in the grant, but which was to be fixed and made certain by subsequent surveys and by proof as to what sections had been previously disposed of, and what sections were subject to the rights of settlers prior to the survey, upon the general principle applicable to all grants, that when the precise location, limits or quantity is left by the deed to be determined by facts extraneous and independent of the deed, parole evidence is admissible to define the limits of the grant. This grant, if accepted, and its acceptance (it being highly beneficial to the State), would be presumed, would become executed, and whatever title it conveyed would vest before claims to any great extent would arise for adjudication under the joint resolution. Congress therefore, in providing for the adjudication of questions arising under it, would be governed by the rules which control their action with reference to grants, as distinguished from *inchoate* titles. Much has been said about the sanctity of the patent in this case. This arises from a misapplication of certain authorities which hold a patent, a full and perfect evidence of title as against strangers, the Government, and, parties claiming under equities only.

In this case we claim under a higher evidence of title than the patent, an act of legislation, which is a direct grant of the fee from the Government itself, whereas the patent is only the act of its ministerial officers. *Grignon v. Astor*, 2 *How.*, 319, (16 *Curtis* 125). No patent ever issues for school sections—see *Gaines v. Nicolson*, cited *ante*.

In the case of *Doe v. Eslava*, 9 *How.*, 421, (18 *Curtis*, 208,) the court make the distinction for which we contend, between inchoate grants and consnmate titles as affecting the jurisdiction of ministerial officers. This was a case in which the Plaintiff claimed under a patent, and the Defendant under a direct grant from Congress. The Plaintiff set up the decision of the Register and Receiver of the land office upon which the patent issned, and relied upon it as conclusive. The act vesting power in the Register and Receiver, authorized them to decide between the parties in all conflicting and interfering claims, &c. The court say: "We do not consider that the acts relied on "(specifying them), meant to confer the adjudication of titles of "land on the Registers and Receivers. These officers are not usual-"ly lawyers, and their functions are generally ministerial, rather "than judicial. Sometimes, as in the case of pre emptioners, "they are authorized to decide upon the question of cultivation "or not; and here, from the words used no less than their char-"acter, they must be considered as empowered to decide on the "true location of grants or confirmations. The language chang-"es in the acts of Congress whenever the local land officers

"are to act in any way on titles, and the expression is distinct, "*'titles and claims.*'"

So in *Wilcox v. Jackson* cited *ante*, the court say, "even admitting that in the absence of frauds, the decision of the Register and Receiver would be conclusive as to the facts of the "applicant being in possession, and his cultivation (evidently "meaning as required by the pre-emption law). Yet if they undertake to grant pre-emptions on land which the law declares "shall not be granted, they are acting upon a subject matter "clearly not within their jurisdiction, &c."

To apply these principles—

The Joint Resolution refers us, as it is claimed to the pre-emption act of 1841 for the authority of the land officers. If the power assumed in this case is not conferred by that act, of course it does not exist.

As we have seen, two questions only, are by that act submitted to them.

First, When two settlers have settled upon the same quarter, the right of pre-emption shall be in him who made the first settlement, and all questions *as to the right of pre-emption arising between different settlers shall be settled by the Register and Receiver.* Is the State a settler? Has she a pre emption right? Does the term "right of pre-emption" embrace the title held by the State under the grant?

And Secondly, "Prior to any entries being made under, and by virtue of, the provisions of this act, proof of the settlement and improvement *thereby required* shall be made to the satisfaction of the Register and Receiver. Do the words "thereby required" refer to the settlement and improvement required by the Joint Resolution passed sixteen years afterwards? On the contrary, the Joint Reolution of March 3rd, 1858, requires a settlement prior to the survey, and *in addition to that*, the proof above mentioned. Whence, then, do the Register and Receiver derive their authority? But we are not without an unbroken current of authorities in support of the conclusion to which we are led by reason and principle.

In *Stoddard v. Chambers*, 2 *Howard*, 284, (15 *Curtis* 119), an act of Congress had provided that all lands claimed under a French or Spanish title, which had been filed with the recorder of land titles, should be reserved from sale until the decision of congress could be had thereon. The Defendant entered and received his patent for a tract of this description prior to the decision of Congress. The Plaintiff, after the confirmation of his claim by Congress, brought ejectment. The court allowed the character of the title, and the fact that it had been duly filed to be shown, and held that these facts showed that the officers allowing the entry had no jurisdiction, and that the patent was

arising under the grant, to the summary decision of the ministerial officers and agents of the grantor; but even if this arbitrary power could be tolerated, it would not be presumed in the absence of express language to that effect.

In the words of the court, in *Comegys against Vasse*; 1 *Peters* 193, (7 *Curtis* 529) "They (the Register and Receiver,) "could not be presumed to be possessed of the means of exer-"cising such a broad jurisdiction with due justice and effect.— "They had no authority to compel the State to appear and liti-"gate before them, nor to summon witnesses to establish or re-"pel her interests, and under such circumstances, it could not "be presumed that it was the intention of either Government to "clothe them with authority so summary and conclusive, with "means so little adapted to the attainment of the ends of substan-"tial justice."

The joint resolution of March third, 1857, are in themselves sufficiently dangerous, even when expounded and administered by tribunals learned in the law, and possessed of full powers for the detection of frauds.

But it is seriously insisted that Congress has submitted the entire interests of the magnificent school fund of the West which have from the earliest period of legislation, respecting the public lands, been specially favored by Congress, and around which with the most jealous care, guards against fraud and peculation have been thrown by the State and National Legislatures, to the judicial determination of certain ministerial officers of the Government, ignorant of law, possessing none of the powers or attributes of a court, and acting upon *ex-parte* statements, and by summary proceedings.

The bare statement of the proposition exhibits its monstrosity.

There is nothing, however, in the law, conferring such power either expressly or by implication.

The Resolution of March third, 1857, *when any settlement by the erection of a dwelling house or the cultivation of any portion of the land shall have been or shall be made, prior to the survey*, authorized the authorities to select other lands in lieu of those thus taken. The fact must exist. Had it been intended to confer jurisdiction upon the land officers to determine judicially whether such settlement was in fact made prior to the survey, Congress would have said, "whenever it shall appear to the satisfaction of the Register and Receiver that such settlement was so made," or words to that effect indicating such purpose.

But the second clause seems to remove all doubt—"and if *such settler* (one who has settled on the land prior to the survey,) can bring himself within the act of September 4th, 1841 he shall be entitled to pre-empt, &c." The sole jurisdiction in

tended to be vested in the land officers is here limited and defined, viz: *such settler*, (and none other) the fact of prior improvements existing, is subjected to the provisions of the pre-emption law, and to the jurisdictiou of the Register and Receiver, so far as conferred by that act. If not such settler he is not subject to that act; but upon turning to the act of 1841, the conclusion is rendered irresistible. The only sections vesting judicial functions in the Register and Receiver are 11 and 12, act 4th September, 1841, (*5 Stat.* 455.)

Section 11 declares that when two or more persons shall have settled on the same quarter section, the right of pre emption shall be in him who made the first settlement, &c., *and all questions as to the right of pre emption arising between different settlers* shall be settled by the Register and Receiver. The language admits of no mistake, and is sustained by reason and justice. The jurisdiction of these ministerial officers is confined to *inchoate* claims as between different *settlers*. The State, as we shall see more fully hereafter, is not a settler, and claims no pre-emption or *inchoate* right but holds by an executed grant. The Register and Receiver, as agents of the Government, are empowered to decide between parties applying to purchase, as to which is entitled to buy at the Government price, but cannot by any act of theirs judicial or otherwise, devest or affect rights vested by an executed grant from the Government.

Section *twelve* provides that prior to any entries being made under, and by virtue of, the provisions of this act, proof of the settlement and improvements *thereby* required shall be made to the satisfaction of the Register and Receiver. This section limits their jurisdiction, to the settlement and improvements required by the pre-emption act and the resolution of March third, 1857, so far from enlarging their jurisdiction, confines them expressly within it. We see here, also, that when power is intended to be vested in these officers, it is conferred in express terms.

The proof is to be to their satisfaction, but by the joint resolution, the fact of settlement prior to the survey, is not submitted to them, either expressly or by implication.

We have now ascertained the sources and extent of the authority under which it is claimed the land officers acted. It will not be claimed that any presumption exists in favor of judicial power in a ministerial officer. Their powers, it will be admitted, are only those expressly conferred by law. The joint resolution makes no mention of these officers; settlement prior to the survey, as we have seen, was not to be proved to their satisfaction, but must exist, and the reason for this is obvious. Congrsss had made a grant to the State which had not yet taken effect, it is true, but which, upon acceptance, would vest a large and valu-

void. Why are we not permitted to show the same facts, for the same purpose?

In *Ludiga v. Roland*, 2 *Howard*, 681, (15 *Curtis*, 211), the treaty with the Creeks provided for the selection by every head of a family, of one half section, to include any improvements made by him *prior to the date of the treaty*. The Plaintiff was allowed to prove that she was the head of family, and had made such improvements on the land in dispute, that the officer expressly appointed to locate, adjust and decide upon claims under the treaty, had rejected her claim, and that a patent had been issued to the Defendant. The court held the patent void for want of jurisdiction.

We desire to show that improvement had not been made for a precisely similar purpose. Our case is stronger, however, in this; the Plaintiff in that case had appeared before the officer and submitted herself to his jurisdiction. The State has never been a party to the proceedings relied upon by the Defendant.

*Brush v. Ware*, 15 *Peters*, 93, (14 *Curtis* 34), was a bill in equity. A certificate of military services had been assigned, which assignment was, as was alleged, procured by fraud.—Upon this certificate the Register issued a warrant to the Assignee, and upon that warrant, a patent had issued. The complainant set up the fraud. The Defendent alleged as in this case that the Register must of necessity have determined the right of the applicant before issuing the warrant; but the court say, "The Regisier acted ministerially; he was not authorized to examine witnesses in the case, and was bound to act upon the face of the certificate." Such was the case here, except as to the improvement and settlement required by the pre-emption law—the officers acted ministerially, and were bound to act upon the *ex-parte* affidavits of the pre-emptor, as they had no power to require the attendance of the State, or to examine witnesses. It was not suggested in that case that the complainant should have shown that he had had no opportunity to appear and contest before the Register.

*Wilcox v. Jackson*, 13 *Peters* 498, (13 *Curtis*, 266), was a pre-emption case. Land had been reserved for military purposes. A pre-emption was allowed by the Register and Receiver under the act of May 29th 1830, which vested jurisdiction in the Register and Receiver in the same language as section 12 of the act of September 4th, 1841. The act of 1830, like that of 1841, also prohibited the entry of any land reserved from sale. The court admitted evidence upon the question as to whether said land had been reserved from sale; and finding that it had, declared the action of the officers void for want of jurisdiction.—The court below alluding to this, in their opinion in the case at bar, say they have found but one pre-enption case, and there the

grant was void from a *clear want of jurisdiction in the officers. Exactly*, but it was held void because proof was admitted to show that want of jurisdiction, and when shown, was not more clear than the facts which we seek to prove. The question in *Wilcox v. Jackson* was, "are the lands reserved; and to show this, evidence was admitted that they had been so designated on the plot and had been occupied as a mititary post. Here the question is the same, and the evidence, the want of settlement prior to the survey.

In the case of *Stevens v. McCargo*, 9 *Wheaton*, 502. (6 *Curtis* 153), the Legislature of Virginia had granted a pre emption right to certain parties who had marked and improved a tract of land. They had authorized any person to enter any waste or unappropriated land. The Defendant had entered and procurred a patent to a tract of land which had been marked and improved by ths Plaintiff. The court held the patent void, and that land so marked conld not be regarded as unappropriated. Parole evidences was here introduced upon the question as to whether the land was, prior to a certain time, appropriated as determining the jurisdiction, which is precisely the evidence which we seek to adduce. The fact that the land was unappropriated, must have there been decided by the officer before he could have allowed the entry; but the court did not hesitate to declare his acts void as an excess of authority.

The court in this case makes an important distinction which runs through all the cases and is applicable to the case at bar.—"The proposition that a patent is an appropriation of the land which it covers, although the proceedings to its emanation are irregular and defective, is unquestionably true; but this principle has never, so far as is known to the court, been applied to a case in which the opposing title to the particular land in controversy had its commencement before the patent was issued." The title of the State to school lands had its commencement March 3rd, 1849, or if not, at least, February 26th, 1857; the pre-emption under which Defendant claims, was made August 15th, 1857, and no patent issued until November 10th, 1859, long after the admission of the State, and the accruing of a full and perfect title under the grant.

In the case of *Polk's Lessees v. Wendell*, 9 *Cranch*. 87, (3 *Curtis*, 276,) *reaffirmed in same case*, 5 *Wheaton*, 293, (4 *Curtis*, 632,) North Carolina had ceded to Congress certain territory, reserving certain existing rights. A patent based upon such pretended rights, it was said would be void if it could be shown that no commencement of right in the ceded territory existed previous to the cession, so as *to bring the party within the reservation*. In the case at bar, the theory was that certain innocent parties settling prior to the survey, had acquired eque-

ties, and such cases were reserved from the grant to the State; but if we show that no such settlement existed prior to the survey, the party is not within the reservation, and we are strictly within the precedent last cited.

In the case of *Lytle v. State of Arkansas*, decided under the pre-emption law of May 29th, 1830, the court hold as in Wilcox *v.* Jackson, that the Register and Receiver are a tribunal to determine the rights of those who claim pre-emptions; and that if they acted within their powers, their decision is final.

The case of *Gaines v. Nicolson*, 9 *Howard*, 356, (18 *Curtis*, 174,) quadrates with the case at bar. This, also, was a school land case. The treaty with the Choctaws had reserved certain lands to settlers who had made improvements thereon prior to the date of the treaty. The trustees of a school section donated to the State of Mississippi, by Congress filed a bill in equity, alledging that the section in controversy had been appropriated by Congress for the use of schools; that the Defendants had falsely and fradulently represented that their grantor resided thereon at the date of the treaty, and had made improvements, thus bringing the case within the strict terms of the treaty, and presenting a case in which the right was confessedly paramount to any which could be pretended in the State or township as a school reservation. The court say, "That undoubtedly, if the facts thus charged had been established by pleadings and proofs, a right to such equitable interposition has been made out; bnt the complainant failing to sustain these rllegations, the bill was dismissed, and complainants left to a suit at law. In the absence of fraud the court saying the question was one of conflicting title. The case is a full and perfect authority for the claim of the Plaintiff.

The doctrine that the jurisdiction of the Register and Receiver is confined strictly to deciding upon the sufficiency of improvements under the pre-emption law, is well illustrated by the case of *Cunningham v. Ashley*, 14 *Howard*, 377, (20 *Curtis*, 233,) a case which goes much farther than the court is asked to go in the case at bar.

The case arose under the pre-emption law of March 29th, 1830 being the same under which Wilcox *v.* Jackson was decided, and which as we have seen, confers the same jurisdiction upon the officers as is conferred by section 12 of the act of September 4th, 1841. The Plaintiff claimed a pre-emption right under the act, and produced proof of his settlement and improvements, as required by law. The Defendant applied to locate certain certificates, which were authorized by the second section of the same law, to be located on any lands, "*but so as not to interfere with other settlers having a right of preference.*"

The entries were allowed and patents issued. The Plaintiff

filed his bill ; the court held that the certificates being located upon lands upon which Plaintiff had a right of preference, the entry was in violation of law, and the patent void. In this case the officers had decided between two parties, both claiming the pre-emption law ; but the Plaintiff was allowed to show *that he had settled on the land*, and therefore the Defendant could not, under the law legally enter it.

We ask to show that Defendant had not settled on the land and therefore could not legally enter it.

This closes the list of authorities which we deem it necessary to cite. The principle for which we contend in different forms, maintained by them all that the duties of these land officers are almost entirely ministerial ; that so far as they exercise *quasi* judicial functions, they are confined to the determination of inchoate rights ; that their decisions cannot prejudice an equity arising previous to the the issuance of the patent ; that they can only act when expressly authorized ; that any attempt to allow pre-emptions upon lands reserved for any purpose is absolutely void, and that parol evidence is always admissable to show the fact of such reservation, and to impeach the acts of the officers.

So far as these cases have arisen, under the various pre-emption laws, they are unanimous that proof required by the pre-emption law, is the only fact upon which the officers can decide judicially ; and that it is never competent for them to decide upon the question as to whether lands are, or are not within a reservation.

G. E. COLE,
Attorney General State of Minnesota.

# SUPREME COURT

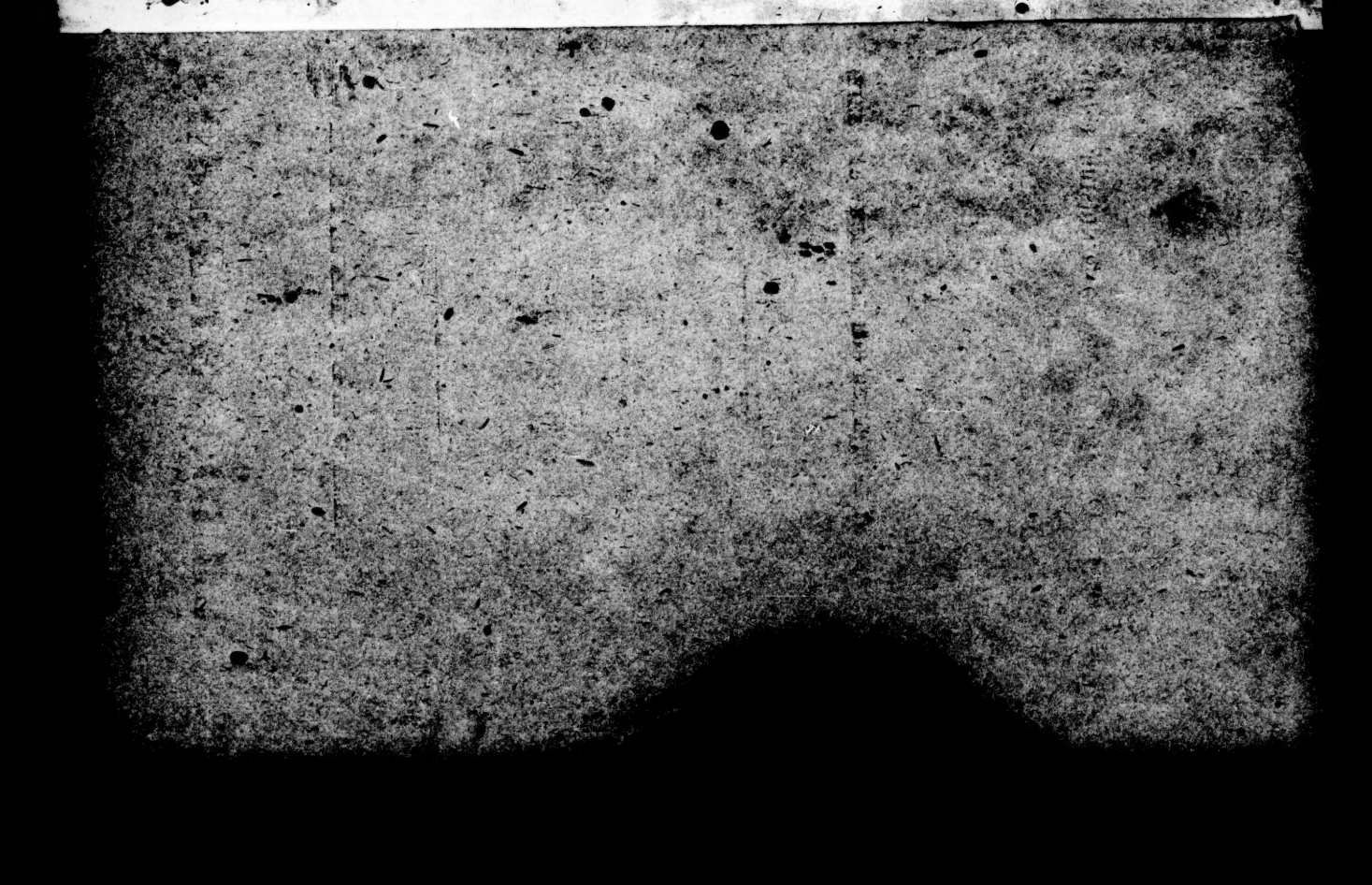
OF THE

# UNITED STATES.

STATE OF MINNESOTA,
PLAINTIFF IN ERROR,
AGAINST
GEORGE W. BATCHELDER,
DEFENDANT IN ERROR

## BRIEF AND ARGUMENT FOR DEFENDANT IN ERROR.

JOHN B. BRISBIN, OF COUNSEL FOR DEFENDANT IN ERROR.



# SUPREME COURT

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STATE OF MINNESOTA,
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AGAINST
GEORGE W. BATCHELDER,
DEFENDANT IN ERROR

**Error to the Supreme Court of Minnesota.**

## BRIEF FOR DEFENDANT IN ERROR.

This action was commenced in the District Court, for the Fifth Judicial District, State of Minnesota, on the 25th day of October, 1860.

The complaint alleges that the Plaintiff had been in possession of the lands described therein from the 25th day of June, A. D., 1860, and was entitled to the same, and that the Defendant claims an interest therein adverse to the Plaintiff.

The answer alleges title in the United States on August 15th. 1857, a pre-emption of the premises in dispute by Defendants grantors at the proper land office on that day, the issuing of patents on such pre-emptions November 10th, 1859, and a sufficient conveyance from the pre-emptors to Defendant after the issuing of said patents.

The reply, embracing seven subdivisions, denies title in the United States August 15th, 1857, alleges title in the United States February 26th, 1857, and admits the pre-emptions, issuing of the patents thereon, and in the 3rd, 5th, 6th and 7th subdivisions (being those afterwards demurred to and stricken out) attempts to charge that the pre-emptions were procured by fraud and false representations and that the Defendant had notice thereof.

These were the pleadings as amended by consent of the parties before trial.

The Defendant demurred to the said 3rd, 5th 6th and 7th subdivisions of the amended reply, which demurrer was sustained by the District Court, and these subdivisions were struck out—which order on appeal was affirmed by the Supreme Court of Minnesota. (See Bill of Exceptions in the case.) Without amending these pleadings as thus settled by the demurrer the parties proceeded to trial on the issues made up by the complaint, the answer, and the 1st, 2nd and 4th subdivisions of the reply, the Plaintiff on such trial offering to introduce evidence to sustain the allegations contained in those subdivisions of the reply demurred to and stricken out, which evidence was excluded, and the Defendant introducing the duplicate certificates of pre-emption and patents, the Plaintiff admitting proper conveyances from pre-emptors to Defendant.

Instructions were asked for by the Plaintiff and refused as appears by the Bill of Exceptions.

The Jury returned a verdict for the Defendant and judgment was entered thereon, which judgment was affirmed by the Supreme Court of Minnesota.

## POINTS AND AUTHORITIES.

ON THE JURISDICTION.—This Court has no jurisdiction and the Writ of Error should be dismissed because in this action there is not drawn in question the construction of any clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, wherein the decision is against the title, right, privilege or exception specially set up or claimed by the Plaintiff under such clause of the Constitution, treaty, statute or commission.

*Fisher vs. Cockerell*, 5 *Peters* 248. *Lessee of Reed vs. Marsh*, 13 *Peters* 153, *Armstrong vs. Treasurer of Athens Co.* 16 *Peters* 281. *Rutherford vs Fisher*, 4 *Dallas* 22. *Young vs. Grundy*, 6 *Cranch* 51. *Gibbon vs. Ogden*, 6 *Wheat.* 448. *State vs. Batchelder*, 5 *Minn.* 223.

ON THE MERITS.—I. There was no error in the conduct of the trial in the District Court, because even if the pleadings on which the cause was tried had been sufficient, (as they were not, *State of Minnesota vs. Batchelder*, 5*th Minn. R.* 223. *Ditto*, 7*th Minn. R.* 121.

*Comp. Statute of Minn.* 543, *Sec.* 88,) to warrant the examination of the points raised by the Plaintiff, the Court rightly refused to charge that the Joint Resolution of March 3d, 1857, was void.

1. The organic act of the Territory of Minnesota did not divest the United States of title in the lands therein reserved or take the same out of the control of Congress.

*Lester's Land Laws*, 498 *&* 499. *Vincennes University vs. State of Indiana*, 14 *Howard* 268, *opinion of Taney C. J. Gaines vs Nicolson*, 9 *Howard* 356. *Organic Act of Minnesota Territory, March* 3, 1849. *Enabling Act of February* 26, 1857. *Joint Resolution of March* 3, 1857, (*Lester's Land Laws* 285.)

2. The memorial of the Legislature of Minnesota authorized the passage of the Joint Resolution even if the Organic Act had placed the lands in question beyond the control of Congress.

Memorial Session Laws of Minnesota, 1856, p. 368.

Opinion of the Court below in the case 7 Minn. R. 135.

Vincennes University vs. State of Indiana, 14 Howard, 268.

Organic Act of Minnesota, sec. 6. State Constitution Schedule, sec. 1 & 2.

II. And rightly refused to charge that this resolution did not apply to lands within the State of Minnesota.

1. It was based on the memorial of the Territorial Legislature and employs the language adopted in the Organic Act to reserve sections 16 & 36.

2. At the time the resolution was passed Minnesota was a Territory.

3. The offer made in the Enabling Act did not constitute a grant.

*State vs. Batchelder*, 5*th Minn. R.* 239 *and* 240.

*Ham vs. State of Missouri*, 18 *How.* 126.

4. The Joint Resolution was a modification of the offer made to the State and an amendment of the pre-emption law.

III. And rightly held that the Register and Receiver of the proper Land Office had jurisdiction to receive proofs and grant the pre-emptions.

1. The Joint Resolution being a modification of the offer made to the State and an amendment of the pre-emption law, placed the lands affected thereby in the same position as all other lands subject to pre-emption, and so gave the Register and Receiver of the proper Land Office jurisdiction to hear proofs and allow their pre-emption, and in so doing they acted in a judicial and not in a ministerial capacity, and their decision on such applications is not to be reviewed in a collateral action

*U. S. Statutes, vol.* 5, 456, *sec.* 10, 11, 12.

*Lester's Land Laws*, 238, (*Amendments*) *and* 285 (*Joint Resolution.*) *Bouvier's Law Dictionary, vol.* 2, 259, *title "Offer" definitions*, 3 *and* 4. *McCulloch vs. Eagle Ins. Co.*, 1 *Pickering* 277. *Mactier vs. Frith*, 6 *Wendell* 103. *Grignons Lessee vs. Astor*, 2

*Howard* 338. *McConnell vs. Wilcox*, 1 *Scamm* 353. *Bruner vs. Manlove*, 1 *Scamm.* 156. *McGhee vs. Wright*, 16 *Ill. R.* 555. *Leech vs. Rauch*, 3 *Minn* 451. *Cooper vs. Roberts*, 18 *How.* 178. *McCready vs. Goldsmith*, 18 *How.* 87. *Comegys vs. Vasoe*, 1 *Peters* 193. *Brush vs Ware*, 15 *Peters* 93.

2. The entries have been confirmed by the issuing of patents and ratified by the action of the State.

*Constitution of Minnesota, Article* 2, *Section* 3.

IV. The evidence ruled out—besides being objectionable on the grounds already urged, was not offered at the proper stage of the trial, and for this reason alone was properly excluded.

V. The State has no reason to complain on equitable grounds ot the passage of the Joint Resolution and the pre-emptions allowed under it.

The above is a synopsis of the points relied on by the Defendant in Error, which points, and the authorities sustaining them, are more fully stated in the following argument in the same order and under the same numbering as in the above brief.

BATCHELDER & BUCKHAM,
Attorneys for Defendant in Error.

JOHN B. BRISBIN,
Of Counsel for Defendant in Error.

# SUPREME COURT

OF THE

# UNITED STATES.

STATE OF MINNESOTA, PLAINTIFF IN ERROR.

AGAINST

GEORGE W. BATCHELDER, DEFENDANT IN ERROR.

**Error to the Supreme Court of Minnesota.**

## ARGUMENT FOR DEFENDANT IN ERROR.

As to the JURISDICTION:

It must appear from the *record per se strictly considered* that some one of the points specified in the twenty-fifth section of the Judicial Act of 1789 was drawn in question in the State Court and decided in the manner required by that section in order that the *final* judgment in the Court below may be examined here on Writ of Error.

Fisher vs. Cockerell, 5 Peters, 248.

Lessee of Reed vs. Marsh, 13 Peters, 153.

Armstrong vs. Treasurer Athens County, 16 Peters, 281.

Then arises the question: What is the "*record strictly considered*" to be examined by this Court in order to decide upon the question of its own jurisdiction? It is such portion of the pleadings as make up and constitute the issues finally tried and determined, the bill of exceptions, and the final judgment or decree of the State Court. The demurrer to the third, fifth, sixth and seventh grounds of the reply for the insufficiency thereof, and the order of the State Courts sustaining the demurrer, and the said third, fifth, sixth and seventh grounds of reply demurred to and decided to be insufficient, and all interlocutory proceedings in the Courts below in making up and settling the issues which were

finally tried and determined, must be laid out of the case, as they are all mere questions of local law and practice in, and will be left to be determined by the State Courts. They are not a subject for re-examination here.

See cases cited above. Also, Rutherford vs. Fisher, 4 Dallas, 22. Young vs. Grundy, 6 Cranch, 51. Gibbons vs. Ogden, 6 Wheat., 448. State vs Batchelder, 5 Minn., 223.

These grounds of the Plaintiff's reply and all proceedings showing the insufficiency thereof being laid aside, as it is stated by the learned Judge in the final decision of the Court below:

"The case was left standing upon the first, second, fourth and "eighth clauses in the reply. The issue, and the only issue raised, "was that the United States was not the owner of the land at the "date of the pre-emption made by Lewis and John N. Mills, but "had previously on the 26th day of February, 1857, conveyed it "to the Plaintiff."

The Plaintiff alleges in his first ground of reply:

"That on the 26th day of February, A. D., 1857, the United "States then being lawfully possessed as owner in fee simple of "said land by an Act of Congress, approved on that day, duly granted and conveyed said land to the Plaintiff," &c.

That is, the Plaintiff claims a title to the land by virtue of the Act of Congress of February 26th, 1857, entitled the "Act to authorize a State Government for Minnesota," which is not allowed to him by the decision of the State Courts, and it is upon this ground that the Plaintiff claims that this Court upon Writ of Error has jurisdiction to re-examine and review the final decision of the State Court herein.

We think the Writ of Error should be dismissed for the following reasons:

1st. It does not appear on the face of the record either in express terms or by necessary intendment that any of the points specified in the 25th section of the judicial Act were drawn in question in the State Courts.

2nd. It does not appear on the face of the record or by necessary intendment, that the State Court was required to or did construe or attempt to construe the said Act of February 26th, 1857, or any clause or portion thereof, and the same was not in fact construed by the State Court.

3d. There was no question of law either as to the construction or meaning of the said Act of February 26th, 1857 upon the trial or decision in the Court below. The only question raised in the Court below was one purely of fact as to whether the lands in controversy were included among the lands offered to the State, or those excepted by the Act.

4th. The Defendant in his answer in the Court below, having set forth the pre-emption and purchase of the said lands by Lewis

and John N. Mills at the proper Land Office, and the judgment and decision of the proper Land Officers, viz.: the Register and Reciever of the proper United States Land Office, and the duplicates and patents, and the subsequent sale and conveyance of the said land by the pre-emptors to the Defendant, and these facts being admitted and uncontroverted by the Plaintiff, there could be no room for question or doubt that they were excepted from the lands offered to the State.

5th. The Plaintiff claims no title, right, privilege or exception "specially set up" or otherwise, under the Joint Resolution of March 3d, 1857, and if the validity of the said resolution came in question the decision was in favor of the validity thereof and therefore no ground for appeal.

6th. The Plaintiff did not in the Court below set up or claim any title, right, privilege or exception under the Act of March 3d, 1849, the "Act to establish the Territorial Government of Minnesota," for he expressly alleges in the first ground of the reply that, "On the 26th day of February, A. D., 1857, the United States then being lawfully possessed as owner in fee simple of said land," &c., which allegation estops the Plaintiff from claiming any title to the land by virtue of the organic Act of March 3d, 1849.

As to the MERITS and correctness of the decision in the Court below:

I. What is the issue tried and determined in this cause?

By reference to the pleadings it will be seen that the Plaintiff in his complaint claims to have been in possession of the land in question from June 25th, 1860, without setting forth any title or grounds of possession. The Defendant by his answer sets up that on August 15th, 1857, the title to the land was in the United States, that it was on that day pre-empted and purchased of the Government and the usual duplicate certificates of sale were received by the pre-emptors, that the patents issued to the pre-emptors November 10th, 1859, and that the pre-emptors afterwards conveyed the lands by usual warrantee deeds to the Defendant. These facts as stated in the Defendant's answer are admitted by the Plaintiff, but the Plaintiff alleges in his reply: that on the 26th day of February, 1857, the United States were owners in fee of the lands in question, and that by an Act of Congress approved that day (the act authorizing a State Government for Minnesota) the United States conveyed the lands to the Plaintiff.

This is the entire substance of the pleadings and the whole issue as made up and tried in the Court below. The reply originally contained some further allegations but as we have already seen,

they were disposed of by the demurrer as both immaterial in themselves and under our State practice insufficiently pleaded, laid out of the case and abandoned.

State vs. Batchelder, 5th Minn. R., 223. Ditto, 7th Minn R., 121.

The Defendant does not admit any allegation of the reply by demurring to such allegations as insufficient, for by the statutes of Minnesota the reply is the last pleading in the cause (unless demurred to,) and "shall not in any respect conclude the Defendant."

Compiled Statutes of Minnesota 543, Section (88.)

The first point now made by the Plaintiff in Error is: "That the Joint Resolution of Congress of March 3d, 1857, is void," &c., for the reason that these lands were reserved for the purpose of being applied to schools by the 18th section of the Organic Act of the Territory, approved March 3d, 1849. The language of the Act is:

"When the land in said Territory shall be surveyed sections 16 "and 36 shall be and the same are reserved for the purpose of be- "ing applied to Schools," &c.

We have already shown that the Plaintiff in Error is estopped by his pleadings from claiming any title or right under the Act of March 3d, 1849, or any Act prior to Feb. 26th, 1857, because the reply expressly alleges that at the last date "*The United States was 'awfully possessed as owner in fee simple* of said lands."

But suppose his pleadings permitted him to claim title under the Organic Act of the Territory—

1. The language employed in the Organic Act as quoted above does not in any respect resemble a grant or dedication, nor does it place those lands beyond the control of the Government. It is a mere reservation by its own terms. It does not provide in what manner they shall be applied to schools, nor to what kind or class of schools, nor whether such application shall be under the direction of Congress or the Legislature of Minnesota The opinion of Chief Justice Taney in Vincennes University vs. State of Indiana, 14 Howard, 268, gives the true construction of such a reservation. See also, the construction given by the Com. and Sec'y of Interior cited in Lester's Land Laws, 498 and 499.

Nor has such a provision ever been regarded by Congress or the States or Territories for whose benefit such reservations have been made, or by the Courts as a grant or contract binding on the United States, or as placing these lands beyond the control of Congress. Congress has invariably passed other Acts in addition to such a reservation expressly providing for the protection of and granting the lands to the States for which they were reserved, and this has been done in the case of Minnesota.

See Organic Act for the Territory of March 3rd, 1849.

Act of February 19th, 1851, (Lester's Land Laws, 173,) providing for the protection of these lands.

Enabling Act of February 26th, 1857. Gaines vs. Nicolson, 9 Howard, 356. Vincennes University vs. State of Indiana, cited above.

But if the reservation contained in the Organic Act had placed the lands in question beyond the control of Congress by putting the title in abeyance as claimed by the Plaintiff, the people of Minnesota Territory being the beneficiaries of that Act by their memorial passed by their Legislature, February 26th, 1856, would have surrendered and forfeited all right to the same and Congress would have full power with the consent and at the request of the people of Minnesota through their Legislature to provide for and authorize the pre-emption of the lands.

The following is the Memorial referred to, which sufficiently explains itself:

## *A MEMORIAL TO CONGRESS FOR THE RELIEF OF CERTAIN SETTLERS UPON SCHOOL LANDS.*

To the Honorable the Senate and House of Representatives of the United States in Congress assembled: The Memorial of the Legislative Assembly of the Territory of Minnesota respectfully represents:

That under the provisions of the Act of Congress, extending the provisions of the pre-emption law of 1841, over the unsurveyed lands of Minnesota, many of our settlers have heavy investments, both of money and labor, in the opening of farms, erection of buildings, and the laying out and improving of town sites, (lots in which said town sites were frequently transferred before the Government survey, at high prices, to the occupants thereof,) who were found when the Government survey was made, to be upon the school sections, and that the said settler had no means of ascertaining previous to the survey, where the school sections would come.

That it is a great injustice and hardship to compel such persons to re-purchase or lose entirely the improvements and homes, made by themselves in good faith, in the expectation of pre-empting or entering them according to the provisions of the statute. Therefore, your Memorialists would respectfully request your Honorable Body to pass an Act, giving such persons in this Territory as have, previously to the Government survey, settled upon the school sections, (and have otherwise the right of pre-emption,) the right to pre-empt the same, as other Government lands are pre-empted. And also providing for the entry of the town sites in this Territory, which are on school sections and were occupied as such, previous to the Government survey, as other town sites upon unoffered Government lands are entered.

And also allowing the County Commissioners of the county in which such lands may be situate, to enter in lieu thereof, for the

benefit of the school fund of the township in which such land so as aforesaid settled or occupied may be, and without charge, an equal amount of such surveyed lands, subject either to private entry or pre-emption, in the same Land District as they may select.

And as in duty bound your memorialists will ever pray.

CHARLES GARDENER,
*Speaker of the House of Representatives.*
JOHN B. BRISBIN,
*President of the Council.*

APPROVED—February twenty-six, one thousand eight hundred ane fifty-six.

W. A. GORMAN.

I hereby certify the foregoing to be a correct copy of the original Memorial on file in this office.

J. TRAVIS ROSSER, *Secretary of Minnesota Territory.*

The Joint Resolution of March 3d, 1857, passed in response to this Memorial is published in Lester's Land Laws, 285.

And such was the view taken by the Supreme Court of Minnesota in the decision of this cause State vs. Batchelder, 7 Minn. R. 135.

The people of the Territory of Minnesota whose Legislature passed the Memorial and who were the real beneficiaries of the reservation were vested by the Organic Act (see Organic Act sec. 6) with Legislative power which "shall extend to all rightful subjects of legislation consistent with the Constitution of the United States and the provisions of this Act," and by the 1st and 2d sections of Schedule annexed to the State Constitution their laws and contracts were all recognized and continued in force by the people of the State of Minnesota. The effect of such a provision in the State Constitution is declared in Vincennes University vs State of Indiana, cited above.

And in the decision of the Court below sought to be reversed the point is distinctly stated (see 7 Minn. R., 139.) "If there "was any lack of power in the Territorial Legislature to speak for "the Territory in asking the change to be made, or in the Consti- "tutional Convention in accepting the school lands thus encum- "bered, it was certainly cured by the ratification of the Constitu- "tion by the people on the 13th of October, 1857."

"We think there is no question as to the validity of the Joint "Resolution"

II. The second point made by the Plaintiff in Error is "If "not void, it, (the Joint Resolution,) does not extend and apply "to school lands within the present limits of the State."

1. By an examination of the Joint Resolution of March 3d, 1857, and also the provisions of the Organic Act of the Territory it will be seen that the Joint Resolution employs the very lan-

guage used in the Organic Act to reserve Sections 16 and 36 for the use of schools in Minnesota, to designate the lands to which that Resolution was to apply. This of itself is sufficient to settle the question whether it applies to the territory now embraced in the State of Minnesota to say nothing of the occasion of that Resolution being passed and of the construction uniformly given to it by all of the Departments of the United States and the State of Minnesota.

2. But Minnesota was in fact a Territory on March 3d, 1857, at the time of the passage of the Joint Resolution and long afterwards. The Constitutional Convention did not frame the State Constitution till August 29, 1857, after the lands in question were purchased of the Government. The Constitution was not adopted by the people until October 13th 1857, and Minnesota was not admitted into the Union as a State till May 11th 1858.

3. Nor does the Enabling Act of Febuary 26th, 1857, under which the Plaintiff claims title and which in Plaintiff's view excludes the lands within the limits of the present State from the effect of the Joint Resolution, purport to be an *immediate grant* but simply an *offer* on certain conditions "to the Convention of the people of Minnesota for their free acceptance or rejection" and it has been construed by the highest Court of the State and by other Courts both State and Federal as not amounting to an absolute grant till after its acceptance by the Constitutional Convention (August 29th 1857,) and the subsequent adoption of the State Constitution by the people (on the 13th of October, 1857) : that prior to that time it was only conditional and subject to such modification as Congress saw fit to make. The Court below adopted this view of the Enabling Act (5 Minn. R. 239 and 240) and see also Ham. vs. State of Missouri 18 How. 126.

4. The Joint resolution was a modification of this offer and at the same time extended the right of pre-emption over lands embraced in Sections 16 and 36 where the settlers thereon could show their settlement to have been made prior to the United States survey of the land and could bring themselves within the provisions of the pre-emption law. The proof must be made at the proper United States Land Office as was done by the pre-emptors of the lands in question and that they furnished satisfactory proof to the Land Officers and brought themselves within the provisons of the pre-emption law is best and conclusively proved by the decision of the said Land Officers the granting of the pre-emptions and the subsequent confirmation and ratification of their acts by the Government and the acquiescence and express ratification by the State.

The adjudication and pre-emption at the proper Land Office the duplicate and patent which are pleaded in the answer and admitted by the reply are in the absence of fraud conclusive. Such has been the decision of this Court in many instances some of which

decisions are cited hereafter on the question of jurisdiction under the third subdivision of Defendant's brief.

III. The third point made by the Plaintiff in Error is conceding the validity and application of the Joint Resolution, the Register and Receiver of the Land Office had not jurisdiction to receive the proofs and grant the pre-emption.

We have already seen that no such issue was raised or tried in the Court below. The want of jurisdiction in the Land Officers is not pleaded, the only allegation touching this point being contained in the 7th subdivision of the original reply which was disposed of by the demurrer as not only immaterial, but insufficiently pleaded under our local law and practice laid out of the case and formed no part of the issue which was tried and determined and the want of jurisdiction cannot be tried originally in this Court upon Writ of Error. But suppose the Plaintiff in Error were at liberty to raise the question here—how does it stand on its merits ?

1 The pre-emption law of Sept. 4th 1841 provides for the entry by pre-emption of all surveyed lands with a few exceptions among which are those "reserved for the support of schools" and also provides that the proof of the settlements and improvements thereby required and all questions as to the right of pre-emption shall be submitted to and determined by the Register and Receiver of the district within which the lands are situated agreeably to such rules as are prescribed by the Secretary of the Treasury with the right of appeal from the decision of the Register and Receiver as therein provided.

The Joint Resolution of March 3d, 1857, without impairing any contract or disturbing any vested right was engrafted upon the pre-emption law of Sept. 4th, 1841, enlarges its provisions and extends the area to which it is applicable and must be interpreted in connection with and as forming a part of said pre-emption law and the better adapting of that law to the wants of the community at whose immediate request the Joint Resolution was passed and as modifying the offer just made to the Constitutional Convention of Minnesota. Bouviers law Dictionary vol. 2 259 title "offer" Definitions 3 and 4 McCulloch vs. Eagle Ins. Co. 1 Pickering 277 and Mactier vs. Frith 6 Wendell 103 are refered to as authorities defining and explaining the legal force of an "offer" and the control over such offer possessed by the parties till the same becomes part of a binding contract But it would seem that no one reading the memorial of the Teritorial legislature and the Joint Resolution of Congress passed in compliance with and in response to this memorial can fail to conclude that this Joint Resolution is to all intents and purposes an amendment to, and a part of the pre-emption law of September 4th, 1841, and that all pre-emptions made under the Resolution were to be made conducted and allowed at the proper Land Office like other pre-emptions before the Register and

Receiver under the general provisions of the law of Sept. 4th 1841 and the rules prescribed by the Secretary. Both the memorial and the Joint Resolution in express terms refer to the pre-emption law of 1841 and by the Resolution the settler is required to bring himself within the provisions of that Act one of which provisions is that "proof of his settlement and improvement must be made to the satisfaction of the Register and Receiver." No provision is anywhere made by Congress for the pre-emption of land except at the local Land Offices and through the Register and Receiver they being entrusted with all the business relating to the pre-emption entry and sale of the Government Lands in their respective districts. The simple fact that Congress has passed an Act authorizing these lands to be pre-empted (if there were no such provisions in the law as have been referred to as to the manner and place of such pre-emption) is sufficient and good authority to pre-empt them at the proper Land Office and through the Register and Receiver—the pre-emption of these lands standing on the same footing with every pre-emption.

The language of the Joint Resolution "where any settlements " by the erection of a dwelling house or the cultivation of any por- " tion of the land shall have been or shall be made upon the 16th " and 36th sections ("which sections have been reserved by law " for the purpose of being applied to the support of schools in the " Territories of Minnesota, Kansas and Nebraska, and the States " and Territories hereafter to be erected out of the same,") before " the said sections shall have been or shall be surveyed, &c.," by no means implies that the questions of time of settlement, erection of the dwelling house &c., are to be left open to inquiry after the land has been pre-empted and conveyed, or that these questions are not settled and concluded by the decision of the Register and Receiver by the granting of the pre-emptions as in every case where land is pre-empted, for the conditions of pre-emption under the Joint Resolution, are substantially the same and the language similar to that in the pre-emption law of Sept. 4th 1841, which reads as follows:

"Every person being the head of a family or widow or single " man over the age of twenty-one years and being a citizen, &c., or " having filed his declaration, &c., who since the first day of June " A. D. 1840 has made or shall hereafter make a settlement in " person upon the public lands, &c., which has been or shall have " been surveyed prior thereto and who shall inhabit and improve " the same, and who has or shall erect a dwelling thereon, shall " be and is hereby authorised to enter, &c.,"

If the questions of settlement, erection of a dwelling house and all questions as to the right of pre-emption under the Joint Resolution are not concluded by the decision of the Land Office, the pre-emptions and patents, then for the same reasons all those ques-

tions should be left open forever, to be examined collaterally after they have been tried and determined by the Land Officers under the pre-emption law of Sept. 4th 1841 and after the lands have been conveyed to other parties by the pre-emptors. But this is contrary to all the decisions of all the courts upon this point.

The Plaintiff in Error does not claim that there was any fraud on the part of the pre-emptors or any one, but claims that the Register and Receiver *did not act Judicially but Ministerially* in hearing the proof and granting the pre-emption of the lands in controversy, and therefore claims that the question is still open, and that it is a proper subject of enquiry for the State Courts, whether the decision and judgment of the Land Office was based upon sufficient proof. This court has repeatedly and uniformly held that neither the State nor Federal Courts were authorized to make any such inquiry. No authority need be cited to support this proposition. It is true that in some of the cases cited by Counsel for Plaintiff in Error, the Land Officers are spoken of as acting ministerially. This term ("ministerial") may with propriety be applied to some of their acts, such as allowing parties to enter land at private entry where no proof is required and the purchaser has only to tender his money or land-warrant to the Register and receive his certificate of purchase, but in no instance have the courts applied this term to the acts of the Register and Receiver in adjudging and granting pre-emptions upon proof offered under the pre-emption law. These acts are by all the authorities cited by the Plaintiff in Error, as well as all others we have been able to find on the subject, termed "*Judicial*" and are regarded like the judgments of any other court. In the following cases the question has been directly passed upon and the courts have treated the acts of the Register and Receiver as *Judicial* acts and the authorities are cited to show how uniformly the courts have taken this view of their authority when acting in pre-emption cases.

McConnell vs. Wilcox, 1 Scam., 353. Bruner vs. Manlove, 1 Scam., 156. McGhee vs. Wright, 16 Ill. Rep. 555. Leech vs. Rauch, 3 Minn., 451. Cooper vs. Roberts, 18 How., 173. McCready vs. Goldsmith, 18 How., 87. Comegys vs. Vasse, 1 Peters., 193. Brush vs. Ware, 15 Peters., 93.

2. The entries of the lands in controversy have been approved confirmed and ratified by the United States by the issuing of the patents thereon more than two years after the entries were made and have been acquiesced in and expressly ratified by the State of Minnesota by the adoption of her constitution and the express acceptance contained therein of the first proposition in the fifth section of the Enabling Act of February 26th 1857, as modified and amended by the Joint Resolution. The Supreme Court of Minnesota held in the examination of the questions arising on the demurrer in this

action that "if the State allowed the time to elapse within which "it could have obtained relief in the same Court, (Land Office), "without appealing to that tribunal its negligence is a good answer "to an action of this nature." Till long after the entries were made and vested rights had been acquired under them the action of the Land Office was acquiesced in by all parties concerned and no objection is alleged to have been made by the Officers of the State or its Legislature to the memorial, the Joint Resolution or the pre-emptions allowed under it till the commencemet of this action. It is difficult to see what can amount to a waiver of a legal claim on the part of one entitled thereto if the State is still at liberty to repudiate the action of the Territorial Legislature, the Constitutional Convention and the Officers having oversight and control of the school lands since the admission of the State.

This disposes of all the points raised by the Plaintiff in Error.

IV. The evidence offered and ruled out is objectionable on other grounds in addition to those already considered and going to the merits.

It appears from the Plaintiff's bill of exceptions, upon which the cause went from the District Court where it originated to the Supreme Court of the State that the final judgment which is sought to be reversed, affirmed the judgment in the District or lower State Court. That the only evidence offered in the District Court which was rejected and upon which the Plaintiff's exceptions rest was that which, even if admissible at all, was only admissible as rebutting evidence. It was offered *before the Plaintiff rested* and not at the proper stage of the trial. The Court was not bound by any rule of law or practice to receive such evidence till the Defendant had closed his testimony under the answer. If there were no other reason than this, the Court below was right in sustaining the ruling of the District Judge at the original trial of the cause.

V. In answer to that part of the argument of the Attorney General on behalf of the State which endeavors to present the Joint Resolution and the pre-emptions allowed under it in the light of a violation of the equitable claims of the inhabitants of the State, and of emigrants attracted to it by its munificent school grants, it is only necessary to remind the court that the whole intent of the Resolution under which the defendant's grantors acquired title, was to *benefit the state and all its citizens* by recognizing and providing for the equities of the settlers on sections 16 and 36 before the survey and yet keeping the school lands themselves unimpaired. It expressly provided that "other lands should be selected by the proper authorities in lieu of" those allowed to be pre-empted by the resolution, such as the parties selecting might prefer out of the whole body of public lands. It reserved and provided for any rights the state might equitably claim under the Organic Act or Enabling Act and in no respect lessened the amount

or altered the character of the lands reserved and offered for the States acceptance. The Joint Resolution, even if it had not been asked for by the people of Minnesota, regarded in an equitable light is therefore an enlargement of the original offer; an act of friendly legislation whose intent and actual result were to benefit the State and to which the State cannot justly take exception.

Again, so long as the United States have granted other lands equally valuable, in lieu of those pre-empted, it was a question of no concern to the State what regulations the United States might adopt as to the proof required to bring the settler within the provisions of the amendment. The allowance of such pre-emptions in no respect altered the character or value of the bequest to the State or raised any equity in its favor as to the tribunal which should try or the proof which should determine such right of pre-emption.

The Attorney General in support of the propositions on which he rests his case has cited a large number of authorities both from the decisions of this Court and those of the State Tribunals. To make anything like an extended examination of these authorities and show how they are inapplicable to the questions involved in the case at bar would swell the argument to an unreasonable length and unnecessarily tax the time and attention of a Court presumed to be familiar with its own decisions and the leading cases adjudicated in the State Tribunals. But in some instances the citations from the Plaintiff's authorities are so skilfully selected and so ingeniously ingrafted into his own argument that they seem on their face to bear directly upon the question at issue and to be almost conclusive. For this reason a brief examination will be made of his leading authorities.

A large proportion of the authorities cited are in support of plaintiffs first propsition; but so far from showing that a *reservation* is a *grant* they do not even touch on this point but contain discussions of the question whether in case of a grant (absolute and unconditional and unquestioned as to the fact of intention) the title passes when there is no grantee in esse and even this point is discussed in almost every instance with reference to highways, streets, alleys and squares in cities regularly laid out and dedicated to public purposes, the Court sometimes applying to those cases the doctrine of abeyance and sometimes of estoppel in pais. The Defendent in Error is not disposed to question the soundness of a doctrine sustained by so many decisions, and although the Courts are by no means uniform either as to the extent to which such dedications are sustained or the grounds on which they are placed, yet the settled course of decisions in this country seems to be in favor of the validity of such dedications, in reference to highways, streets, and alleys, when fully and solemnly made, and when so made the

grant is not resumable at the pleasure ot the grantor. But the question raised in the case at bar, is not, *can there be* a dedication of a highway or even *could* there have been a grant of the lands in question if Congress had so intended, or in such case would Congress have possessed the right to resume the lands so granted, but it is *was there any grant* in this case and what is the legal effect of such a *reservation* as the one under examination. The Defendant in Error therefore leaves such cases as 8 Met. 243, 20 Wendall 119, 4 Paige ch. 510, 2 Vt. 480, 3 Vt. 521 and do. 530, 6 Peters, 498. 12 Wheaton, 582, and some others without examination as having no reference to the case at bar. The quotations made from the opinions in all this class of cases mustbe understood with reference to the questions there under dicussion, and as wrested from their fair meaning when applied to the question involved in this cause. In another class of cases from which the plaintiff quotes largely and which comprises the leading cases on grants and dedications for charitable and religious purposes the doctrine is enunciated that where the owner of lands grants the same for charitable or pious uses where the grant is clear and explicit, and everything is done on the grantors part necessary to complete the dedication, courts of equity will enforce the grant and this in some instances where the grantee was not in existence at the time of the grant. In discussing these questions the courts have sometimes made use of expressions which *standing by themselves and unexplained by the language in immediate connection and the state of facts to which they are intended to apply* might seem to warrant conclusions by no means intended when the language was used. This is the most that can be made of these cases by the plaintiff and in some of these the language is very guarded and the doctrine laid down with a good deal of caution as one not to be extended and liable to much abuse. But in all these cases the *fact* of the grant is undisputed and the only question raised is as to its validity and extent, and not one of these has any bearing on the interpretation of the language of the Organic Act of Minnesota. Of this class are 6 Hill, 407, 3 Paige ch. 296, 17 Sargeant & Rawle 88. 91, 2 Peters, 566, 10 Peters, 662, 6 Peters, 431, 3 Peters 99. and Post vs. Piersol, 20 Wendal, 119, and 22 Wendal 429, in which case the whole question of such dedications, and the adiudged cases in England and in this country were fully reviewed and the correctness of the generally received doctrine *very strongly questioned*, the court using the following language. "I confess with deference that all the learning I have "seen upon the subject and we have much in the amer- "ican courts has not yet convinced my mind that a grant is either "good or can be made so by a court of chancery either in religious "or other cases where there is no person in existence capa- "ble of taking anything under it. Nor am I convinced that it

" will help the case to call the grant by another name, " that of dedication." In Rice vs. Osgood 9 Mass. 37 the legislature in grantlng a township ot land took security of the grantee to assign a certain portion to the first settled minister in fee and a like portion for the use of the ministry forever. The only question decided by the court was that the plaintiff had mistaken his remedy, though in the discussion they remarked that neither the town nor the minister had any vested claims independant of any act of the grantee, and even after assignment by the gaantee the estate is in him till tnere is a person or corporation in esse to accept and *he or they do accept*, acceptance being held esential.

In Gaines vs. Nicolson, 9 How. 356, cited by plaintiff as authority on the 1st and 3d propositions; the Indian title to the land in question, was not extinguished till the treaty at Dancing Rabbit Creek, Sept. 27th 1830, over fourteen years after an act had been passed, (3 Stat. at large 163,) authorizing agents properly appointed by the state courts to take possession of the reserved lands, lay them out into convenient farms, lease and improve the same, *and apply the proceeds to purposes of education within the townships.* This might well be considered as "vesting the title in the state" without being an authority on the effect of a reservation like the one in the case at bar. On the question of jurisdiction the case is not in point, because it does not touch upon the power of judicial officers like Registers and Receivers of land offices but only on that of ministerial officers

Trustees for Vincinnes University vs. State of Indiana, (14 H. 268,) The majority opinion does not expressly decide the question whether a reservation in an act of Congress of a township to be afterwards designated by the Sec. of the Treasury *and which was so designated*, passes title. They say, "and there can be no doubt from the authorities that the right vested as soon as a capacity was given to the corporation to receive it, prior to this it romained in the federal government, this is the settled doctrine"

Taney, C. J., Catron, J. and Daniel, J. dissented and Taney, C. J. says,

"The act of 1804, under which the lands in question were reserved * * merely provides for the sale of the public lands in the " territory reserving from sale this and other portions of them. " I do not see how these laws * * devest the title which the United " States held and which this law directed to be retained * * with " all the research I have been able to make, I have not found a " single instance in which lands reserved in a territory for the purposes of education were not afterwards granted to the state as " the trustee &c , * * A reservation is not a grant, it does not pass " the title out of the United States but leaves it where it was before." Congress always passes subsequent laws to transfer title to the states whose validity has not been questioned. He distinctly re-

pudiates the doctrine of abeyance contended for by the plaintiff and examines and comments on Gaines vs. Nicholson.

In Paulet vs. Clark, 9 Cranch. 292, the language of the grant was, "do give and grant in equal shares unto our loving subjects &c, their heirs and assigns forever — to have and to hold the tracts of land to them and their respective heirs and assigns forever," and the court differing in opinion on the doctrine of abeyance held that after such a donation the crown could not resume or alien the property. The point in issue was, whether on the creation of a regularly organized church the title would vest. The case is in point only when we assume that in the case at bar there was an express grant in its nature irrevocable.

Wilcox vs. Jackson, 13 Peters. 498, cited in support of plaintiffs three main propositions. Certain lands embracing Fort Dearborn had been reserved from sale. As to the *reservation* there was no question. On the 19th day of June, an act was passed reviving the act granting pre-emption rights to settlers, but expressly excepting lands reserved by the United State (such as the premises in suit.) On the 26th day of June another act was passed authorizing the President to cause certain lands to be sold, excepting "lands reserved by law for the use of schools, and for other purposes."

The court held that the provisions of the one act were not intended to have any effect upon the subject matter on which the other operated, the only resemblance to this case being, that the two acts were passed one week apart and had relation to public lands. And upon the point of the jurisdiction of the Register and Receiver it appears that there was an agreed statement of facts showing that the land was expressly reserved and appropriated by the United States, both in law and in fact for a military post and not within the body of lands subject to the jurisdiction of the land officers, not being offered for sale or pre-emption under any circumstances.

The authorities cited by the Attorney General in reference to the power of a Territorial Legislature and the authority of a constitutional convention have too remote a bearing on the questions at issue to require particular examination. With these questions this court must be entirely familiar and could hardly be expected to examine authorities on points so well understood and so often adjudicated.

On the plaintiffs second point, authorities are less numerously cited and of these but two or three require examination.

The opinion of the Secretary of the Interior (Lester's Land Laws 494. ) has reference to the following state of facts, an offer of certain sections was made to Michigan June, 23d 1836, on condition that the legislature under the authority confered upon it by the constitutional convention, should pass a certain irrevocable or

dinance, similar to the one required of Minnesota. The ordinance was passed July 25th 1836, and thereupon the title vested in the state. Eleven years afterwards an act was passed under which a party claimed to acquire title to part of a section so granted to the state. The commissioner decided adversly to his claim.

Ruthford against Green's heirs 2 Wheaton 196, only decides that "shall be granted" connected with the appointment of commissioners and express directions to survey certain tracts out of the lands reserved for the use of the army, and not (as in the case of the offer to Minnesota,) as the language of an offer conditioned on something to be done by the grantee before the offer shall be deemed accepted, are apt words to denote a present grant.

Gaines vs. Nicolson, 9 How. 356 and Wilcox vs. Jackson 13 Peters, 498, have been refered to before.

The authorities cited under the third point of the Plaintiffs brief do very little in support of the proposition under which they are cited and so far as they have the slightest bearing upon the issues in this case go to establish complete and exclusive jurisdiction in the Land Officers to grant the pre-emption of the lands in controversy.

*Comegys vs. Vasse*, 1 Peters, 193, is a case under the treaty of the United States with Spain whereby three commissioners were appointed to receive, examine and decide upon the amount and validity of the asserted claims upon Spain, for damages and injuries.—And the Court expressly holds that the decision of the Commissioners as to the amount of damages awarded against Spain itself, is final and conclusive but that they had no authority to adjust conflicting rights to the fund awarded, which grew out of an alleged equitable assignment by the original claimant. And Justice Story in giving the opinion of the Court, says:

"Their decision within the scope of this authority is conclusive "and final. If they pronounce the claim valid or invalid, if they "ascertain the amount, their award in the premises is not reexam-"inable. The parties must abide by it as the decree of a compe-"tent tribunal of exclusive jurisdiction &c. "But it does not nec-"essarily or naturally follow, that this authority so delegated in-"cludes the authority to adjust all the conflicting rights of different "citizens to the fund so awarded."

Then follows that part of the decision cited by counsel for the Plaintiff in Error which is entirely irrelevant to this case.

In the case of Doe vs. Eslava, 9 How. 421, the Plaintiff in Error claimed under a French grant and the Defendant in Error claimed under a Spanish grant. The title of both parties was confirmed by the same Act of Congress and the United States had issued a quit claim patent for the land, but the United States *never had any title* to the land, therefore, the Court decides that the "parties stood on equal ground under the Act of Congress and [illegible] necessary to resort to the antecedent condition of the

title to decide between them. The Acts of the Register and Receiver upon the presentation of the certificate (*this was not a pre-emption*) and the patents were of course void because they were not the true source of title in either party. In the case at bar both parties claim title through the United States and the Defendant has acquired title by purchase from the pre-emptors.

In *Stodard vs. Chambers* 2 How. 284, the plaintiff's claim was under the Spanish Government and the land in controversy was expressly reserved by Congress and withdrawn from sale to await the decision of the Commissioners. At the time of the Defendants entry it was no part of the public lands authorized to be sold. The title of the Defendant was founded on an entry made by virtue of a New Madrid certificate which was made against the express provisions of the law. This case is no authority touching the *jurisdiction of land Officers in allowing pre-emptions like the case at bar.*

Lodiga vs. Rolland, 2 How. 681 cited by Plaintiff in Error is a case arising under our treaty with the Creek Indians. The Plaintiff in Error one of the Creek tribe of Indians and the head of a Creek family claimed a half section of land including her improvements expressly reserved to her by the treaty and to which the United States acquired no title. The Officer who acted for the Government was a "Deputy Locating Agent," merely to locate the Indians in that particular township where the lands were situated. He did not profess to act judicially, did not, and could not grant land or give any deed duplicate or evidence of title. The Plaintiff in Error by the terms of the treaty had the right to select and hold her land without permission from the Government or any Officer or Agent. She proved the elder title which came through her own tribe. The Defendant's patent was void because of its collision with the Treaty.

In the case of Brush vs. Ware 15 Peters, 93 the Defendant entered the land at private entry with a warrant which showed on its face a fraudulent assignment and which warrant in equity belonged to the Plaintiff. The Court found that the Defendant purchased with notice of Plaintiffs interest in the warrant and ordered the Defendant to convey to the Plantiff's, but sustained the entry and did not disturb the action of the Register and Reciver.

Stevens vs. McCargo is a case like the one at bar, *mutatis mutandis*, except that the appellant entered the land at private entry on a treasury warrant. The Land Officers had no proof before them and no judgment to render upon his entry. The Respondent had a *certificate of pre-emption* under the laws of Virginia which the Court decided to be the oldest and best title. Appellant's patent based on his private entry was set aside as void. If a patent were issued to the Plaintiff in the suit at bar it would be set aside for

*Wilcox vs. Jackson*, 13 Peters, 498, and *Gaines vs. Nicolson*, 9th How. 356, are cited elsewhere on our brief and sufficiently commented upon.

*Polks Lessees vs. Wendall*, 9 Cranch, 87 and *Cunningham vs. Ashley*, do not decide anything as to the jurisdiction of the Register and Receiver and furnish no authority in this case. In the latter case some questions arose, on account of the incomplete record in the Land Office, as to whether the pre emption was in fact allowed or disallowed and the elder of the two conflicting claims, the pre-emption was not disturbed but sustained by the court as giving the better title.

The last list of authorities cited by the Attorney General, under this third point on his brief commencing with Elliot vs. Piersol, need not be examined by the Defendant in Error, because they are cited in support of a proposition which is not denied, viz., "Want of jurisdiction (in a court,) is examinable collaterally, provided always that a proper foundation for such examination *must be laid in the pleadings.*

But an examination of the record in this case shows that this is not the question which arose upon the trial, nor the one involved here.

The Plaintiff in Error without raising the question of the jurisdiction of the Register and Receiver in the pleadings, without controverting, but expressly admitting the pre-emptions at the land office within the land district where these lands are situated and a complete record of the pre-emptions in the said land office, the issuing of the duplicates and patents in due form to the pre-emptors, and the subsequent sale and conveyance of the lands by the pre-emptors to the defendant— without denying that the lands in controversy are of that class which is made subject to pre-emption by law when the settler brings himself within the provisions of the pre-emption law and its amendments —without alleging any fraud in procuring or granting the pre-emptions, and with the memorial of the Territorial Legislature still recognized by the State and standing upon the Statute Book wherein the title and control of these lands are acknowledged to have been in the United States, and Congress is requested to pass an act authorizing these pre-emptions to be made, more than three years after these pre-emptions have been allowed under the act of March 3d 1857 amending the pre-emption law, seeks to show in a collateral action that the trial and proceedings at the land office were irregular and that the decision of the Register and Receiver was erroneous and claims that it is the duty of the court to re-examine and correct their proceedings and admit evidence tending to show that the Register and Recevier were mistaken or misinformed at the trial, as to the time when settlements were made upon the lands in controversy.

The Defendant contends that such evidence could not be received by the court because the pleadings would not admit of it, and because it was neither the time nor place to offer such proof under any state of pleadings. That such evidence could be offered only at the United States land office at the trial there and the granting of the pre-emptions, or upon a re-hearing obtained from that department. That the Land Officers sitting as a court were acting within the purview of their authority as shown by the Defendant, had jurisdiction, and their decision was conclusive. If their proceedings were irregular they were themselves the exclusive judges of that irregularity and their decision unreversed was binding upon the State.

This was the question raised upon the trial of this cause. The decision of the state courts sustains the view taken by the Defendant and their decision is now sought to be reversed by this court.

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